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IN THE
Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, WARDEN, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that "only Congress can divest a reservation of its land and diminish its boundaries," and Congress's intent to do so must be "explicit[]" and "unequivocal," *id.* at 470-471. The Questions Presented are:

I. Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.

II. Whether the court properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 DISCLOSURES

Petitioner Osage Nation has no parent corporation, and no publicly owned corporation owns ten percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The Osage Nation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a) is reported at 597 F.3d 1117. The order and judgment of the district court (App., *infra*, 24a) are reported at 597 F. Supp. 2d 1250.

JURISDICTION

The court of appeals entered its judgment on March 5, 2010. A timely petition for rehearing was denied on May 25, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App, *infra*, 57a-71a.

STATEMENT OF THE CASE

1. The Osage Nation is a federally recognized Indian tribe, and its reservation was formally established by Congress in 1872 in what was then known as "Indian territory." Act of June 5, 1872, ch. 310, 17 Stat. 228. The State of Oklahoma was admitted to the Union by the Oklahoma Enabling Act. 34 Stat. 267 (1906) ("Oklahoma Act"). Section 2 of the Oklahoma Act required apportionment of the Territory into 56 districts, one of which was to be coextensive with the Osage Reservation. *Id.* at 268. That requirement was also incorporated into the Constitution of the State of Oklahoma, which provides that "[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County." Okla. Const., art. XVII, § 8. In addition, Section 3 of the Oklahoma Act restricted "the manufacture, sale, barter, giving away * * * of intoxicating liquors within those parts of said State *now known as* * * * *the Osage Indian Reservation* and within any other parts of said State *which existed as Indian reservations*." (emphasis added).

From the Reservation's inception through the present time, the Nation has operated its tribal government from this homeland and has protected important historic and cultural resources on behalf of the Osage people. C.A. App. 26-47 (Osage Nation Constitution). In 1904 and 1905, substantial oil and gas reserves were discovered in the Osage Reservation. *Cohen's Handbook of Federal Indian Law* 311 (Nell Jessup Newton et al. eds., 2005) ("*Cohen*"). To protect the Nation's financial well-being and to prevent exploitation of individual tribal

members, Congress enacted the Osage Allotment Act of June 28, 1906 ("Osage Act"). Unlike many other allotment Acts of the era, which opened Indian lands to settlement by non-Indians, *see* Act of Feb. 8, 1887, 24 Stat. 388 (General Allotment Act), the Osage Act allotted the surface estate in trust exclusively for individual Osage members, while the most valuable part of the Reservation – the subsurface – was reserved in trust for the benefit of the Osage Nation. Osage Act §§ 2-3 (App., *infra*, 59a-67a).

The Osage Act repeatedly referenced the Reservation in the present and future tense. *See* Osage Act § 4 (App., *infra*, 68a) (set aside from oil and gas royalties for "schools on the Osage Indian Reservation * * * conducted for the education of Osage children"); *id.* § 7 (App., *infra*, 70a) (requiring that leases and deeds for lands in the Reservation be subject to approval by the Secretary of the Interior); *id.* § 10 (App., *infra*, 71a) (permitting the establishment of public highways or roads "in the Osage Indian Reservation"); *id.* § 11 (App., *infra*, 71a) (allowing railroad companies to continue the use and benefit of certain lands "in the Osage Reservation").

By reserving the subsurface estate for the Nation and limiting allotment to Osage members, Congress ensured continued federal superintendence over the Osage Reservation. That supervision has continued without interruption and has produced a complex and frequently modified scheme of federal regulation and administration of tribal and individual property rights pertaining to the Osage Reservation embodied in a body of federal regulations acknowledging the continued existence of the Osage Reservation. *See*

generally 25 C.F.R. pt. 177 (1938) ("Agricultural and Grazing Leases, Osage Nation, Oklahoma"); 25 C.F.R. pt. 180 (1938) ("leasing of Osage Reservation Lands for Oil and Gas Mining"); 25 C.F.R. pt. 204 (1938) ("Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas").

2. In 2000, the Oklahoma Tax Commission issued a ruling that asserted a legal claim to collect state income taxes from tribal members who both work and reside on the Reservation. C.A. App. 48-53. The Nation responded by filing suit in the United State District Court for the Northern District of Oklahoma. The complaint sought a declaratory judgment that the Osage Reservation was not disestablished and remains Indian country within the meaning of Section 18 U.S.C. § 1151, and thus federal law precluded the State from taxing those members of the Nation who both earn income and reside within the geographical boundaries of the Nation's Reservation. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

Respondents initially moved to dismiss on Eleventh Amendment grounds, but, after the Nation amended its complaint to include individual members of the Oklahoma Tax Commission, the Tenth Circuit ruled that the suit could continue against the individual members under *Ex Parte Young*, 209 U.S. 123 (1908).

The district court then granted summary judgment for respondents. App., *infra*, 24a-56a. The court held that the Osage Reservation had been disestablished, relying heavily on the fact that the

land was allotted to individual Osage members and Congress's practice with respect to other Oklahoma tribes during the same time period. App., *infra*, 37a-45a.

3. The court of appeals affirmed. App., *infra*, 3a-23a. The Tenth Circuit acknowledged that "the Act did not open any land for settlement by the non-Osage, there is no sum-certain or any other payment arrangement * * * [and] neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language." App., *infra*, 14a. The court thus concluded that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." App., *infra*, 14a.

The court nevertheless ruled that the Reservation was disestablished, relying on the general history of the allotment process, a few comments in the legislative history of the Osage Act, and "[t]reatises and articles in professional journals." App., *infra*, 17a. The court also relied on modern demographic data. App., *infra*, 21a-22a.

The court then rejected the Nation's citation of additional federal statutes expressly referring to the Osage Reservation and recognition of the Reservation by the Executive Branch as "too far removed temporally from the 1906 Act." App., *infra*, 19a (discussing recognition of the Reservation in a House Report in 2004, a 2005 National Indian Gaming Commission opinion letter, and two compacts between the State of Oklahoma and the Nation).

REASONS FOR GRANTING THE WRIT

The court of appeals held that the same Osage Reservation that was repeatedly recognized in the plain text of the Osage Allotment Act of 1906, was textually discussed in prospective language, and has been acknowledged in subsequent statutes and decades of Executive Branch regulations and positions was disestablished by equivocal references in that Act's legislative history, professorial writings, and demographic statistics. In so ruling, the court of appeals adopted and imposed a legal test for disestablishment that is contrary to this Court's precedent and expands and entrenches a conflict in the circuits concerning the proper legal test for disestablishment. While the Second and Ninth Circuits have held that disestablishment may not be inferred in the absence of "substantial and compelling" contemporaneous evidence of congressional intent, and the Eighth Circuit limits its inquiry to the statutory text and contemporaneous legislative evidence, two other circuits (the Seventh Circuit and now the Tenth Circuit) have permitted non-contemporaneous sources entirely external to the relevant statute and the position of the federal government to effect disestablishments.

The court of appeals' decision is also contrary to repeated recognition of the Reservation's existence and continuance by the Executive Branch. Indeed, its disestablishment ruling was entered without even asking for or considering the United States' view on a disestablishment that only the federal government can effect. Instead, while relying on demographic statistics and professorial writings that post-dated

the 1906 Act by a minimum of several decades, the court of appeals declared that evidence of the federal government's view was irrelevant because it was "too far removed temporally from the 1906 Act" to be considered.

Finally, the question is a recurring one the settled resolution of which is of importance not only to Indian tribes, but also to the federal and state governments. Uncertainty and variability in this area of law equally affects the ability of Indian tribes and state and local governments to plan for and exercise governmental authority and economic development. An issue of such unique federal superintendence, control, and expertise that has such a direct impact on the day-to-day operations of tribal, state, and local governments should have a single federal rule. Only this Court's review can provide that much-needed uniformity.

I. THE COURT OF APPEALS' DECISION EXPANDS AN INTER-CIRCUIT CONFLICT OVER THE LEGAL TEST FOR DISESTABLISHMENT OF A RESERVATION.

Review by this Court is warranted because the Tenth Circuit's holding that disestablishment can occur in the absence of any express indication in the statutory text or legislative history and without considering the position of the United States expands a recurring conflict in the courts of appeals over the proper legal test for disestablishment of a

reservation.[1]

The "first and governing" rule, oft repeated by this Court, is that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress's intent to disestablish a reservation, moreover, must be "explicit[]." *Ibid.* Unless "Congress explicitly indicates otherwise," land set aside as a reservation retains that status "no matter what happens to the title of individual plots within the area." *Ibid.*; *see id.* at 478 ("clear statement of congressional intent" required).

The conflict has arisen in how courts of appeals determine that Congress has "explicitly" directed the disestablishment of a reservation. In this case, the Tenth Circuit held that, even when the statutory text is silent and unambiguous, courts can determine disestablishment based not on anything *Congress* said or anything the Executive Branch said, but based on academic professorial writings, demographics, and occasional, isolated snippets of equivocal and ambiguous legislative history. App., *infra*, 14a-22a.

That holding squarely conflicts with the law in the Second Circuit, which held in *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197

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[1] There is no dispute in this case that the Osage Reservation historically existed and was formally recognized by the federal government. *See* Act of June 5, 1872, 17 Stat. 228, 229.

(2005), that the 1838 Treaty of Buffalo Creek did not disestablish the Oneida Indian Nation of New York's reservation. *See also Oneida Indian Nation of New York v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), *cert. granted*, No. 10-72 (Oct. 12, 2010).

Like the Tenth Circuit in this case, the Second Circuit found no indication in the Treaty's text or negotiation history "of a congressional intention to disestablish the Oneidas' New York reservation." *City of Sherrill*, 337 F.3d at 162. The difference is that the Second Circuit stopped there, holding that the absence of any clear direction in statutory text or negotiating history from Congress or from the Executive Branch foreclosed the court from declaring a reservation disestablished. *See id.* at 160 (noting that, in cases where Supreme Court has found diminishment, it has relied on "a textually grounded intention to diminish"). Directly contrary to the Tenth Circuit's decision here, the Second Circuit expressly refused to permit "certain legislative and administrative documents" postdating the treaty to substitute for the explicit and unequivocal congressional direction that this Court required in *Solem*. *Id.* at 162. Instead, "[g]iven the absence of anything in the Buffalo Creek Treaty's text or legislative history supporting disestablishment," the court "conclude[d] that these later documents do not 'unequivocally reveal' the intention necessary to demonstrate disestablishment." *Ibid.* (quoting *Solem*, 465 U.S. at 471). Accordingly, had the Osage case arisen in the Second Circuit and been governed by Second Circuit law, the outcome would have been exactly the opposite and the Osage Reservation

would not have been declared disestablished.

The Tenth Circuit's decision is also flatly contrary to the law in the Ninth Circuit. That court refused to find disestablishment in the absence of express language in the relevant agreement between the tribe and the United States, notwithstanding "a number of post hoc references to the 'former' reservation" in the record. *United States v. Webb*, 219 F.3d 1127, 1137 n.15 (9th Cir. 2000). Consistent with *Solem* – but in direct conflict with the Tenth Circuit's decision here – the court held that, "[e]ven if it were fully credited, the countervailing evidence at best creates an ambiguity as to congressional intent which would have to be resolved in favor of the tribe." *Ibid.* Here, by contrast, the Tenth Circuit found no ambiguity in statutory text and no unequivocal Executive Branch direction, but nevertheless allowed non-contemporaneous publications by professors, post hoc demographic statistics, and vague legislative history references both to create an ambiguity and then to resolve it against a tribe. The rules of law applied by the two circuits are thus irreconcilable.

Likewise, the law of the Eighth Circuit is the opposite of the Tenth Circuit's. The Eighth Circuit has held that, in the absence of evidence in the "historical and documentary record" that Congress intended to diminish a reservation, "we must conclude that at the time of the Act those lands retained * * * reservation status." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1009 (8th Cir. 2010). While the court did look to evidence of congressional intent beyond the statutory text, it limited that inquiry to governmental documents

contemporaneous with the statute's enactment. *See id.* at 1008-1010. Importantly, the Eighth Circuit confined its consideration of non-textual evidence to bolstering an interpretation that was "reflect[ed]" in the legislation itself. *Id.* at 1009. That approach is incompatible with the reasoning of the Tenth Circuit, which rested its finding on modern-day academic and demographic sources in the absence of any contemporaneous evidence of disestablishment and any statutory indicia of disestablishment.

The conflict even reaches into the state court system. In *Yellowbear v. State*, the Wyoming Supreme Court concluded that the relevant statutory language – which included terms such as "cede, grant, and relinquish" – "[c]learly" evidenced a congressional intent to diminish the reservation at issue. 174 P.3d 1270, 1282 (Wyo. 2008). Only after making that determination did the court look to considerations external to the statute to confirm its understanding of Congress's intent. *See id.* at 1282-1284.

To be sure, the conflict in the circuits is not one-sided. The Seventh Circuit takes the same tack as the Tenth Circuit. In *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009), the court found a reservation disestablished even though the relevant legislation "included none of the hallmark language suggesting that Congress intended to disestablish the reservation," *id.* at 664. Instead, the court relied entirely on legislative history statements and post-enactment evidence suggesting that the reservation had been treated "for the most part" as though it had been disestablished.

Id. at 665. Although the record was not uniform on that point, the court permitted atextual indicia both to create the ambiguity and to resolve that ambiguity in favor of disestablishment. *Ibid.*

Accordingly, this Court's review is needed to resolve that conflict in the law. When, as here, the legal standard prescribed by this Court requires "explicit[]" congressional direction, that standard necessarily demands a single uniform rule for identifying such explicit direction. But that is not what has happened. The law in this area now varies so substantially by geography that analysis of the same statutory text would produce polar opposite outcomes depending on the circuit in which the case arises or the land happens to lie. That disuniformity empowers courts to step in and make decisions that are constitutionally assigned to the Political Branches and to do so on legal bases that are unhinged from congressional or Executive Branch direction. Only this Court's review can restore the uniformity required by federal law and enforced by *Solem*.

II. THE COURT OF APPEALS' RULE THAT A RESERVATION CAN BE DISESTABLISHED WITHOUT EXPLICIT DIRECTION IN THE STATUTORY TEXT AND WITHOUT CONSIDERING THE EXECUTIVE BRANCH'S POSITION SQUARELY CONFLICTS WITH THIS COURT'S PRECEDENT

1. In *Solem*, this Court established a "fairly clean analytical structure" for determining whether a

reservation's boundaries had been diminished by an act of Congress, holding that Congress, and only Congress, "can divest a reservation of its land and diminish its boundaries. 465 U.S. at 470. Moreover, "[d]iminishment * * * will not be lightly inferred." *Ibid.* Rather, Congress's intent "must be 'clear and plain.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (quoting *United States v. Dion*, 476 U.S. 734, 738-739 (1986). "The most probative evidence" of such intent is "[e]xplicit" statutory "reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. When such express language is coupled with "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," there is a "presumption" – although not a conclusive one – that Congress intended to diminish the reservation's boundaries. *Id.* at 470-471.[2]

The *Solem* rule concerning the primacy of statutory text is but one example of this Court's rule, applied consistently across many contexts, that clear statement requirements cannot be satisfied by references to extra-textual, second- and third-hand material. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 545 (2002) ("[G]eneral language * * * [is] insufficient to satisfy clear statement

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[2] Reservation "diminishment" refers to a shrinkage of the boundaries of a reservation, while "disestablishment" refers to the complete elimination of reservation boundaries. The same legal analysis applies to both terms. *See Yankton Sioux*, 522 U.S. at 358.

requirements."); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) ("[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires.'") (alteration and omission in original) (citation and some internal quotation marks omitted); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("[W]e have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'") (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

To be sure, in the absence of explicit statutory language, the Court has occasionally looked to legislative history to confirm ambiguous statutory text. The Court has cautioned, however, that such reliance is proper only when contemporaneous legislative events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress" – demonstrate "unequivocally" that Congress intended the legislation to disestablish or diminish the reservation. *Solem*, 465 U.S. at 471. The Court has also recognized the relevance to its analysis of the Executive Branch's "unambiguous" views. *Yankton Sioux*, 522 U.S. at 354; *see Solem*, 465 U.S. at 478 (noting contradictory treatment by the Executive).

This Court has made clear, moreover, that, "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts must "rule that diminishment did not take

place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. That is because, under the Constitution, "Congress possesses plenary power over Indian affairs," and thus only Congress can disestablish a reservation. *Yankton Sioux*, 522 U.S. at 343. When Congress itself does not speak to the question of disestablishment, courts cannot interject a disestablishment decision of their own unanchored in text, unequivocal legislative history, or the expert interpretation of the Executive Branch. To rely on such materials to judicially interpolate a decision Congress never made is to take the decision out of Congress's hands. Simply put, Congress's power can be neither plenary nor politically accountable if courts are free to declare disestablishment based on non-legislative sources and without explicit legislative direction.[3]

2. The statutory text in this case expressly acknowledges the Reservation's continued existence. While the 1906 Osage Allotment Act, Pub. L. No. 59-321, 34 Stat. 539, 540 (1906), allotted the surface lands of the Osage Reservation, only Osage tribal members could receive land. In addition, Congress

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[3] While, on occasion, the Court has discussed events postdating the passage of the relevant legislation as confirming congressional intent, *Solem*, 465 U.S. at 471, the Court has made clear that such materials cannot themselves signal disestablishment. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (noting that "the context of the Act is not so compelling that, standing alone, it would indicate diminishment," but finding diminishment based on "the statute's plain terms").

granted the entire subsurface mineral estate in trust to the Nation as a whole.

As the court of appeals acknowledged, nothing in the 1906 Act's text supports a finding of disestablishment. Quite the opposite, the plain text of the Act repeatedly referred to the Osage "reservation" as continuing in existence. *See* 1906 Act § 4 (App., *infra*, 68a) (set aside from oil and gas royalties for "schools on the Osage Indian Reservation * * * conducted for the education of Osage children"); *id.* § 7 (App., *infra*, 70a) (requiring that leases and deeds for lands in the Reservation be subject to approval by the Secretary of the Interior); *id.* § 10 (App., *infra*, 71a) (permitting the establishment of public highways or roads "in the Osage Indian Reservation"); *id.* § 11 (App., *infra*, 71a) (allowing railroad companies to continue the use and benefit of certain lands "in the Osage Reservation"). The court of appeals' decision, rooted in history articles and statistics is thus at war with the plain statutory text.

Nothing in the balance of the Act's text overcomes that extensive language recognizing the Reservation's continuance. Certainly, the allotment process does not, because this Court "has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation." App., *infra*, at 11a.

Other aspects of the 1906 Act, moreover, affirmatively support reservation status. First, rather than opening the Reservation for "the public

domain" as in *Hagen v. Utah*, 510 U.S. 399, 404 (1994), or requiring the payment of a sum certain for lands ceded by the Nation as in *Yankton Sioux*, the Act set aside certain lands for tribal purposes, thereby maintaining federal superintendence of the Reservation. Second, by restricting allotments to Osage members in trust so that they could not be leased or sold without federal approval, *see* Osage Act § 7 (App., *infra*, 70a), "the Act did not directly open the reservation to non-Indian settlement," and instead, it facilitated the maintenance of tribal cohesiveness. App., *infra*, at 14a. Third, the Act reserved tribal mineral resources in trust for the Nation as a whole, which Congress extended in perpetuity in 1978, dramatically demonstrating congressional intent to continue reservation status and federal superintendence for the protection of the Osage people.[4]

Against those powerful textual indicia of continued reservation status, the Act contains none of the express language of termination that is "[t]he most probative evidence" of Congress's intent to diminish a reservation. *Solem*, 465 U.S. at 470. And since the Act "did not open any land for settlement by

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[4] As if more were needed, this Court made clear in *Mattz v. Arnett* that by 1892, "Congress was fully aware of the means by which termination could be effected," 412 U.S. 481, 504 (1973), but failed to use such language. Indeed, in 1870, Congress demonstrated to the Osage how to terminate a reservation's boundaries when it expressly disestablished the Tribe's Kansas reservation, Act of July 15, 1870, ch. 296, § 12, 16 Stat. 335, 362, which included language of cession and sum certain. *Ibid.* No such language appears in the 1906 Act.

non-Osage, there is no sum-certain or any other payment arrangement in the Act." App., *infra*, at 14a. In short, the Act contains nothing approaching the "'clear and plain'" statement of congressional intent that is essential to a finding of diminishment. *Yankton Sioux*, 522 U.S. at 343. Quite the opposite, the court of appeals rightly recognized that the "operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." App., *infra*, 14a.

3. The silence of the statutory text should have been the end of the matter. Only Congress can disestablish the Osage Reservation, and Congress speaks through the laws it passes. When the text is silent, Congress has not "explicitly" disestablished anything. And courts cannot supplant that congressional judgment by invoking post hoc materials never considered by Congress or by isolating equivocal legislative history snippets.

Yet that is precisely what the Tenth Circuit (and the Seventh Circuit in *Stockbridge*) did. Faced with silent and unambiguous statutory text containing none of the recognized indicia of disestablishment, the Tenth Circuit relied on its perception of "the circumstances surrounding the passage of the act," professorial articles, and demographics. App., *infra*, at 14a.

In so ruling, the court of appeals departed sharply from *Solem*'s straightforward holding that legislative history can support disestablishment only if the statutory text is ambiguous and the legislative

history "*unequivocally* reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." 465 U.S. at 471 (emphasis added).

First, there is nothing ambiguous about the text of the Osage Act and thus nothing to construe by resort to legislative history.

Second, the only statements by members of Congress regarding the Osage Act relate to the allotment of tribal lands and monies. App., *infra*, at 15a-16a. None of the statements even mentions disestablishment of the Reservation, much less expresses an unequivocal intention to accomplish that result. The allotment of tribal property itself is "completely consistent with continued reservation status" and, in fact, the allotment policy was intended to "continue the reservation system and the trust status of Indian lands." *Mattz v. Arnett*, 412 U.S. 481, 496, 497 (1973); *see also, e.g.*, *Solem*, 465 U.S. at 470. Thus, whether or not a single legislator said that Congress needed "to bring about the allotment at the earliest possible time," is irrelevant, App., *infra*, at 16a, and says nothing about Congress's intention with respect to the Reservation's boundaries.

Third, with the exception of a single-sentence statement by a single Osage member opposed to the legislation, the court of appeals cited no contemporaneous statements from the Nation, its leadership, or any other members indicating their understanding that Congress intended to effect disestablishment through the Act. Moreover, the

statement of the single Osage member, which was read into the record through an interpreter, is itself strikingly ambiguous. App., *infra*, at 16a (citing 1 Division Hearings, at 6 (statement of Black Dog) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations."). By treating that single cryptic sentence as relevant evidence of disestablishment – particularly in the absence of any statutory language or agency determination to that effect – the Tenth Circuit cast aside this Court's repeated direction that any atextual evidence of congressional intent must be "unequivocal," *Yankton Sioux*, 522 U.S. at 351; *Solem*, 465 U.S. at 471, and, necessarily, must reflect the views of *Congress* and not just of a private individual. *See Solem*, 465 U.S. at 478 ("a few phases scattered through the legislative history" cannot support disestablishment).

Fourth, the Tenth Circuit improperly relied on conclusory statements by historians decades removed from the passage of the Act as evidence of the "contemporaneous understanding" of the legislation's effect. *Solem*, 465 U.S. at 471; *see* App., *infra*, at 15a-18a. This Court has never rested a finding of disestablishment or diminishment on *post hoc* academic conjecture. And that is for good reason. If "the views of a subsequent *Congress* form a hazardous basis for inferring the intent of an earlier one," *Yankton Sioux*, 522 U.S. at 355 (emphasis added) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963)), the views of

subsequent historians are an even more treacherous guide, especially when, as here, they replace (rather than just clarify) congressional direction.

The Tenth Circuit compounded that error by selectively relying on post-enactment demographic data as evidence of Congress's supposed intent decades earlier to disestablish the Reservation. Disestablishment is fundamentally a question of statutory construction; non-contemporaneous statistical studies simply have nothing to say about that. Indeed, this Court has decried such materials as an "unorthodox and potentially unreliable method of statutory construction," *Solem*, 465 U.S. at 472 n.13, and "the least compelling" of the *Solem* factors. *Yankton Sioux*, 522 U.S. at 356.[5]

4. In support of its conclusion that post-enactment non-governmental indicia support disestablishment, the Tenth Circuit relied on statements by a single, local Bureau of Indian Affairs superintendent referring to the land as a "former reservation." App., *infra*, at 20a. But this Court held in *Solem* that even a *congressional* reference to a "former" reservation will not suffice to effect disestablishment. 465 U.S. at 479.

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[5] At most, such data can be a third-hand tool for confirming – not replacing – statutory text and contemporaneous legislative history. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 420 (1994) ("[O]ur conclusion that the statutory language and history indicate a congressional intent to diminish is not controverted by the subsequent demographics of the Uintah Valley area."); *Yankton Sioux*, 522 U.S. at 351 (demographic data "not so compelling that, standing alone, it would indicate diminishment").

By the same token, the comment of a single regional official cannot hijack Congress's disestablishment authority, especially when they contradict the plain text of numerous federal statutes enacted between 1917 and 1942 referring specifically to the Osage Reservation in the present tense or otherwise reflecting Congress's intent to retain federal superintendence over the Reservation. Indeed, this Court has held that "Congress's own treatment of the affected areas * * * has some evidentiary value." *Solem*, 465 U.S. at 471; *see, e.g.*, 25 U.S.C. § 398 (1924) (providing for the leasing of unallotted land on Indian reservations "other than lands of the Five Civilized Tribes and the Osage Reservation"); 25 U.S.C. § 396f (1938) (excepting from certain leasing provisions "the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma"); 25 U.S.C. § 373c (1942) (excepting certain probate procedures from the "Five Civilized Tribes or the Osage Reservation"); Reaffirmation Act of 2004, Pub. L. No. 108-431; Osage C.A. Br. 31, 36 & n.14 (citing statutes).

Nor, under this Court's precedent, can it trump the views of higher-level Executive Branch officials. *See, e.g.*, *Hagen*, 510 U.S. at 417-418. The Department of the Interior has consistently and from the earliest days of the Reservation administered its statutory duties and performed trust obligations consistent with the Osage Reservation's continued recognized existence. For example, the Solicitor of Interior issued an opinion in 1935 in conjunction with a murder investigation and prosecution on the Osage

Reservation that, for purposes of jurisdiction, the lands in question "may be regarded as within the limits of the Indian reservation" and that "[s]o far as I am advised no act of Congress has severed these lands from the reservation. In the absence of such Congressional action the lands not only remain with the reservation but also qualify as 'Indian country' under the rule that 'Indian country' remains such until the Indian title is extinguished unless other wise [sic] provided by Congress." Memorandum to the Commission of Indian Affairs from Nathan R. Margold, Solicitor, 1 Opinions of the Solicitor 591-92 (December 17, 1935); *see also* C.A. App. 170 (Letter from Penny J. Coleman, National Indian Gaming Commission, to Richard Meyers, Dep't of Interior (July 28, 2005), quoting Letter from Harold D. Cox, Associate Commission for Support Services, to Senator Henry Vellman (Mar. 9, 1971) ("[i]n reviewing the situation, we have not found any Act of Congress which expressly or otherwise terminated the reservation status or operated to remove the boundaries thereof"); C.A. App. 184 (Letter to Honorable Robert S. Kerr, Jr. from Tim Vollman, Regional Solicitor (Feb 15, 1994) (advising the Oklahoma Water Resources Board that it "has no jurisdiction or authority to adjudicate the rights of the Osage Tribe to use the water appurtenant to its reservation")).[6]

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[6] Contrary to the court of appeals' conclusion, App., *infra*, 20a, the isolated statements in the regional reports suggesting that state and county officials had "primar[y]" law enforcement responsibilities within the territory during a given period, are wholly inadequate to resolve the jurisdictional question. *See*

Recently, Interior has been called upon to administer and enforce federal liquor laws based upon its formal position regarding the continued existence of the Reservation. For example, the Assistant Secretary for Indian Affairs certified the Osage Tribe Liquor Control Ordinance, and published the ordinance in the Federal Register, 70 Fed. Reg. 3054 (Jan. 19, 2005), pursuant to 18 U.S.C. § 1161. Section 4 of the Nation's ordinance approved by Interior states: "The Osage Tribal Council, as the sole governing body of the Osage Tribe of Indians, hereby affirmatively declares, asserts, and extends the jurisdiction of the Osage Tribe over the Osage Indian Reservation and all Indian country, as defined in 18 U.S.C. § 1151, *within the exterior boundaries of the Osage Indian Reservation, as described in the Act of June 5, 1872*." 70 Fed. Reg. at 3055.

Moreover, Interior recently approved a Tribal-State Gaming Compact, as it is required to do pursuant to federal law, between the Osage Nation and the State of Oklahoma. 70 Fed. Reg. 13535 (Mar. 21, 2005). The Compact authorizes the Nation to conduct gaming on its Indian lands, as defined by IGRA, *see infra* p. 26 n.7, which include "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4). Since 2005, the Nation has operated gaming operations on parcels of fee land within the boundaries of the Osage Reservation, in

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Solem, 465 U.S. at 465 n.2 & 479 n.23 (noting the law enforcement roles States can exercise on Indian land and citing a study indicating that "Federal, Tribal, and State courts shared jurisdiction over the opened areas in the decades following opening").

accordance with the Gaming Compact. From 2005 through January 2009, the Nation remitted to the State of Oklahoma revenue sharing payments and fees for gaming on fee land totaling $4,235,204.00. C.A. App. 412.

Finally, maps produced by the Department of the Interior and the U.S. Geological Survey depict the Osage Reservation as the only Indian reservation in Oklahoma. App., *infra*, 72a. Some maps not only represent the continued existence of the Osage Reservation, but depict every other tribe in Oklahoma as "Federal Indian Groups Without Reservation." *See* U.S. Geological Survey, Indian Lands 1992, *available at* https://store.usgs.gov/yimages/PDF/101502.pdf (last visited Oct. 21, 2010).

Interior is not alone. The National Indian Gaming Commission ("Commission") is a federal agency charged by Congress with regulating Indian gaming and, if necessary, enforcing the statute against a tribe or gaming management company that may be operating in violation of federal law.[7] When questions arise regarding whether the conduct of Indian gaming is occurring on gaming eligible Indian lands, the government's position on the status of an Indian reservation is critically important and often dispositive.[8] In fulfillment of this statutory duty, the

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[7] The NIGC was created by Congress pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") to regulate Indian gaming activity on Indian land.

[8] The IGRA provides, among other things, that tribal gaming is lawful if conducted on the statutorily defined term

Commission issued an opinion letter concluding that the Osage Nation may conduct gaming on certain parcels of fee land in North Tulsa, Oklahoma, because "they lie within the Tribe's reservation." C.A. App. 166. The opinion is based on historical documents and official records from Interior acknowledging that the Osage Reservation boundaries have not been disestablished.

In addition, the Commission separately approved the Nation's gaming ordinance authorizing gaming activities to be conducted on the Nation's Indian lands as defined by IGRA. *See* Letter from Philip N. Hogen, National Indian Gaming Comm'n, to Chief James R. Gray, *et al.* (Feb. 27, 2007), *available at* www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/gamingordinances/osagenation/osageordamend022707.pdf (last visited Oct. 21, 2010); 25 U.S.C. § 2703(4) (defining Indian lands as "all lands within the limits of any Indian reservation . . . .").

Third, the United States has taken a formal litigation position in *Osage Nation v. United States*, currently pending in the United States Court of Federal Claims, that the Osage Reservation was not disestablished. Department of Justice and Interior attorneys entered into Stipulations of Fact with the Nation that set forth that "[t]he Osage Reservation is located in northern Oklahoma. The Reservation covers roughly 1.47 million acres. The boundaries of the Osage Reservation are co-extensive with the

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"Indian lands," which in most cases means land within a Tribe's reservation boundaries.

boundaries of present-day Osage County, Oklahoma." C.A. App. 176. This stipulated fact was adopted by the Court on September 21, 2006.

The Tenth Circuit, however, completely ignored that extensive and longstanding congressional and Executive Branch recognition of the continued existence of the Osage Reservation. Indeed, the court's legal test gave far greater weight to the views of private scholars and statisticians, App., *infra*, 15a-18a; 21a-22a, than it did to the four federal statutes and longstanding views of two expert federal agencies. That makes no sense. Under *Solem*, only Congress's words can disestablish a reservation, yet the Tenth Circuit leaves no room in its legal standard for what Congress said four times, and thus its test bears no resemblance to this Court's rule that congressional intent is dispositive. Nor does the Tenth Circuit's test factor in the formal position of agencies charged by Congress with administering the relevant laws, unlike *Solem* and *Yankton Sioux*.

This Court's review thus is needed because the court's decision defies Congress's repeated recognition in numerous statutes of the Osage Reservation's continued existence. In addition, federal agencies need a single, consistent answer to whether and when a reservation, like the Osage's, has been disestablished so that they can carry out their important federal responsibilities. For example, the Department of Interior provides services directly, or through contracts, grants or compacts, to 564 federally recognized tribes with a combined service population of approximately 1.9 million American Indians and Alaska Natives in nearly every state.

Moreover, programs administered on scores of Indian reservations throughout the country by Interior include social services, law enforcement and detention services, and natural resources management on 55 million acres of trust lands and 57 million acres of subsurface minerals estates. Commonly, the proper administration of these programs depends upon Interior's official position regarding the status of the Indian reservation where the program is to be applied. But the status of the Osage's Reservation is now unsettled, with the court of appeals on the one hand, and Congress and the Executive Branch on the other providing different answers.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The questions presented in this case are fundamental to the United States' relationship with Indian tribes and, more importantly, the United States' ability to carry out its federally mandated trust relationship with the Osage Nation and other tribes. *See Yankton Sioux*, 522 U.S. at 357 (noting the "present-day understanding of a 'government-to-government relationship between the United States and each Indian tribe'") (quoting 25 U.S.C. § 3601). The Tenth Circuit's divergence from this Court's precedent and inconsistency with other circuits will wreak havoc on the congressionally designated agencies' ability to consistently carry out their duties and uphold their fiduciary responsibilities to Indian tribes throughout the country.

Furthermore, questions of reservation diminishment and disestablishment are recurring

and important. They have arisen in federal courts of appeals and state courts of last resort across the Country, with three decisions addressing disestablishment issued by three different courts of appeals in 2010 alone. *See* App., *infra*, 3a; *Yellowbear, supra*; *Podhradsky, supra*. Such decisions are vitally important, moreover, directly affecting the day-to-day operations of federal, state, local, and tribal agencies.

In fact, this Court's recent grant of certiorari in *Madison County v. Oneida Indian Nation*, 79 USLW 3062 (U.S. Oct. 12, 2010) (No. 10-72), confirms the importance of the question. There, this Court granted review to address, *inter alia*, whether the Oneida reservation in New York was disestablished. Petition for Writ of Certiorari at i, *Madison Cnty. v. Oneida Indian Nation*, No. 10-72 (U.S. July 9, 2010). That grant of certiorari reflects the importance of such disestablishment questions.

It also reinforces the need for review in this case for two reasons. First, it is not at all clear that this Court will find it necessary to address the disestablishment question in that case, since the issue is presented only secondarily and was not decided by the court of appeals in that case, 605 F.3d at 157 n.6. Second, even if the Court were to reach that question, it is narrowly confined to evaluating factually the status of the Oneida reservation. This case, by contrast, presents an overarching legal question about the proper standard for holding that a reservation has been disestablished that cuts across many States and virtually all tribes.

In the alternative, this petition should be held pending this Court's disposition of *Madison County*, with the appropriateness of certiorari taken under review following the Court's decision in that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Madison County v. Oneida Indian Nation*, 79 USLW 3062 (U.S. Oct. 12, 2010) (No. 10-72), and disposed of as appropriate following this Court's decision in that case.

Respectfully submitted,

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APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OSAGE NATION, Plaintiff- Appellant, v. CONSTANCE IRBY, Secretary- Member of the Oklahoma Tax Commission, et al., Defendants- Appellees.	No. 09-5050
OKLAHOMA FARM BUREAU, et al., Amici Curiae.	

ORDER

Before **TACHA**, **EBEL**, and **KELLY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER,
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OSAGE NATION,

Plaintiff - Appellant,

v.

CONSTANCE IRBY Secretary - Member of the Oklahoma Tax Commission; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Warden, Vice-Chairman of the Oklahoma Tax Commission,

Defendants - Appellees.

No. 09-5050

OKLAHOMA FARM BUREAU; OKLAHOMA CATTLEMEN'S ASSOCIATION; OSAGE COUNTY FARM BUREAU; OSAGE COUNTY CATTLEMEN'S ASSOCIATION; OKLAHOMA ASSOCIATION OF

ELECTRIC COOPERATIVES; OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION; OKLAHOMA MUNICIPAL LEAGUE; OKLAHOMA RURAL WATER ASSOCIATION; OKLAHOMA WILDLIFE MANAGEMENT ASSOCIATION; ENVIRONMENTAL FEDERATION OF OKLAHOMA; PUBLIC SERVICE COMPANY OF OKLAHOMA; OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:01-CV-00516-JHP-FHM)

Thomas P. Schlosser of Morisset, Schlosser & Jozwiak, Seattle, Washington (and Gary S. Pitchlynn, O. Joseph Williams and Stephanie Moser

Goins of Pitchlynn & Williams, P.L.L.C., Norman Oklahoma, with him on the briefs), for Plaintiff - Appellant.

Lynn H. Slade, (William C. Scott and Joan D. Marsan of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico; Kathryn L. Bass, Chief Deputy General Counsel, Oklahoma Tax Commission, Oklahoma City, Oklahoma, on the brief), for Defendants - Appellees.

Steven W. Bugg and Jeff L. Todd of McAfee & Taft A Professional Corporation, Oklahoma City, Oklahoma, for Amici Curiae.

Before **TACHA, EBEL,** and **KELLY,** Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant the Osage Nation ("the Nation") appeals from the grant of summary judgment for Defendants-Appellees. The Nation sought (1) a declaratory judgment that the Nation's reservation, which comprises all of Osage County, Oklahoma, has not been disestablished and remains Indian country within the meaning of 18 U.S.C. § 1151; (2) a declaratory judgment that Nation members who are employed and reside within the reservation's geographical boundaries are exempt from paying state income tax; and (3) injunctive relief prohibiting Defendants from collecting income tax from such tribal members. 1 Aplt. App. at 24.

The pivotal issue in this case is whether the Nation's reservation has been disestablished, not Oklahoma's tax policies. The district court held that the Osage reservation had been disestablished; that tribal members who work and live on non-trust/non-restricted land in Osage County are not exempt from state income tax; and that "[t]he Osage have not sought to reestablish their claimed reservation or to challenge [Oklahoma's] taxation until recently," and Oklahoma's longstanding reliance counsels against now establishing Osage County as a reservation. 2 Aplt. App. at 389-407. The district court also denied the Nation's Rule 59 motion. 2 Aplt. App. at 416. On appeal, the Nation argues that its reservation has never been disestablished and is coterminous with Osage County; that tribal members who work and live in Osage County are exempt from state income tax; and that the district court should not have applied equitable considerations to this case. Our jurisdiction arises under 28 U.S.C. § 1291, and because we agree that the Osage reservation has been disestablished, we affirm.

Background

In 1872, Congress established a reservation for the Osage Nation in present day Oklahoma. See Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm to the Great and Little Osage Indians a Reservation in the Indian Territory). In 1887, due to increased demand for land by white settlers and a desire to assimilate tribal nations, Congress passed the Indian General Allotment Act. *See* Act of February 8, 1887, ch. 119,24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-

349, 354, 381). The Osage reservation was expressly exempted from this Act. 25 U.S.C. § 339. In 1907, Oklahoma became a state, and the Osage reservation was incorporated into the new state as Osage County as provided for in the Oklahoma Enabling Act. *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267, §§ 2, 21: *see also* Okla. Const., art. XVII, § 8 ("The Osage Indian Reservation with its present boundaries is hereby constituted one county to be know as Osage County."). Osage County, the largest county in Oklahoma, covers about 2,250 square miles (about 3% of Oklahoma's total land area).

Contemporaneous to passing the Oklahoma Enabling Act, Congress enacted the Osage Allotment Act. *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539. The 1906 Osage Allotment Act severed the mineral estate from the surface estate of the reservation and placed it in trust for the tribe. *Id.* at §§ 2-3. The Act included several provisions regarding tribal government and tribal membership and granted the Osage tribal council general tribal authority. *See Logan v. Andrus*, 640 F.2d 269, 270 (10th Cir. 1981) (noting that nothing in the Osage Allotment Act "limited the authority of the officers therein named to mineral administration or any other specific function"). The Act also allotted most of the Osage surface land in severalty to tribal members. Osage Allotment Act at § 2.

In 2004, Congress passed a statute clarifying the 1906 Act and authorizing the Osage Nation to determine its membership and government structure. Pub. L. No. 108-431, 118 Stat. 2609 (2004) (An Act to Reaffirm the Inherent Sovereign Rights of the Osage

Tribe to Determine Its Membership and Form of Government). This Act refers to the Osage as "based in Pawhuska, Oklahoma," *id.* at § 1, but does not specifically refer to an Osage reservation in the text of the statute, and does not address the reservation status of Osage land.

In 1999, a tribal member who was employed by the Tribe on trust land and lived within the boundaries of the Osage County on fee land protested the State's assessment of income tax on her. *Osage Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 260 F. App'x 13, 15 (10th Cir. 2007). The Oklahoma Tax Commission determined that she did not live in Indian country within the meaning of 18 U.S.C. § 1151, and that her income was taxable. *Id.* After the Commission's decision, the Osage Nation filed the instant suit seeking declaratory and injunctive relief. *Id.* at 15-16. Specifically, the Nation seeks a declaratory judgment: "(1) that the Nation's reservation boundaries have not been extinguished, disestablished, terminated, or diminished and is and remains the Indian country of the Nation; and (2) that the Nation's members who both earn income and reside within the geographical boundaries of the Nation's reservation are not subject to or required to pay taxes to the State . . . on [] income." 1 Aplt. App. at 24. The Nation further seeks injunctive relief prohibiting "Defendants . . . from levying or collecting Oklahoma state income taxes upon the income of the Nation's members who both earn income and reside within the geographical boundaries of the Nation's reservation." 1 Aplt. App. at 24.

The state of Oklahoma and the Oklahoma Tax Commission filed a motion to dismiss, arguing that the Nation's suit was barred by the Eleventh Amendment. *Osage Nation*, 260 F. App'x at 16. The Nation amended the complaint to include the individual members of the Tax Commission as defendants. *Id.* All of the defendants again moved to dismiss based on Eleventh Amendment immunity, and the district court denied the motion, *Id.* On appeal, we reversed the district court's decision to allow the suit to proceed against the State of Oklahoma and the Oklahoma Tax Commission. We determined that the suit could proceed against the individual members of the Tax Commission under the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 22.

On remand, the remaining defendants moved to dismiss, and the district court converted their motion to one for summary judgment. 1 Aplt. App. at 204. The district court determined that "the Osage reservation ceased to exist more than a century ago," 2 Aplt. App. at 389, and that tribal members that work and live on private fee lands in Osage County are not exempt from state income tax, 2 Aplt. App. at 397-02. Applying *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005), the district court also held that federal equity practice precludes the Nation from advancing its claims after Oklahoma has governed Osage County for over a hundred years. 2 Aplt. App. 405-07.

DISCUSSION

It is well established that Congress has the power to diminish or disestablish a reservation unilaterally, although this will not be lightly inferred. *See, e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470, 472 (1984). Congress's intent to terminate must be clearly expressed, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and there is a presumption in favor of the continued existence of a reservation, *Solem*, 465 U.S. at 472. Courts may not "'ignore plain language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe's later claims.'" *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990) (quoting *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985)).

We have noted that "the Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent [regarding reservation boundary diminishment]." *Yazzie*, 909 F.2d at 1393 (listing cases). While determining congressional intent is a matter of statutory construction, which typically involves a de novo review, to the extent that statutory construction turns on an historical record, it involves a mixed question of law and fact. *Id.* "Where a mixed question primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Id.* at 1393-94 (internal quotation marks and citation omitted).

We apply the three-part test summarized in *Solem* to determine whether a reservation has been

diminished or disestablished. Congress's intent at the time of the relevant statute governs our analysis. The Supreme Court has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation. Aplee. Br. at 18. In ascertaining Congress's intent, the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage. *Solem*, 465 U.S. at 469. The "operative" language of the statute carries more weight than incidental language embedded in secondary provisions of the statute. *Id.* at 472- 76. The Court will infer diminishment or disestablishment despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of [the] act "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* at 471. In addition to (1) explicit statutory language and (2) surrounding circumstances, the Court looks to (3) "subsequent events, including congressional action and the demographic history of the opened lands, for clues to whether Congress expected the reservation boundaries to be diminished." *Yazzie*, 909 F.2d at 1395. Such latter events will not govern if "an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands . . . ." *Solem*, 465 U.S. at 472. Thus, "subsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from

an Act and events surrounding its passage." *Yazzie*, 909 F.2d at 1396.

With these standards in mind, we turn to whether the 1906 Osage Allotment Act disestablished the Osage reservation.

A. *Statutory Language*

Statutory language is the most probative evidence of congressional intent to disestablish or diminish a reservation. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470. Examples of express termination language include: "'the Smith River reservation is hereby discontinued,'" *Mattz v. Arnett*,412 U.S. 481, 505 n.22 (1973) (discussing 15 Stat. 221 (1868)); "'the same being a portion of the Colville Indian Reservation ... be, and is hereby, vacated and restored to the public domain,'" *id.* (discussing 27 Stat. 63 (1892)); "'the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby, abolished,'" *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618 (1977) (discussing 33 Stat. 218 (1904)); "'the . . . Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest,'" *DeCoteau v. District County Court*, 420 U.S. 445, 455-56 (1975) (discussing Agreement of 1889, ratified by 26 Stat. 1035 (1891)). An act's language is not sufficient evidence of an intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation –

e.g., making reservation lands "'subject to settlement, entry, and purchase.'" *Mattz,* 412 U.S. at 495, 497; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962). Likewise, language authorizing the Secretary of the Interior to "sell and dispose" of reservation land is insufficient to terminate a reservation. *Solem*, 465 U.S. at 472-73.

The manner in which a statute compensates a tribe for opened land is also instructive. Some statutes provide that the tribe will be paid a sum-certain amount as compensation for all of the unallotted land. Others provide payment to the tribe as the lands are sold. Sum-certain payments indicate an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate. *Compare DeCoteau*, 420 U.S. 425 (holding that the reservation was terminated where there was express language regarding termination, a sum-certain payment, and tribal consent to the agreement) *with Mattz*, 412 U.S. 481 (holding that the reservation was not terminated where there was no express language regarding termination nor a sum-certain payment).

Explicit language signifying an intent to terminate a reservation combined with a sum-certain payment creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*, 465 U.S. at 470-71.

The *Solem* court found additional factors weighing in favor of continued reservation status: (a) authorization for the Secretary of the Interior to set

aside lands for tribal purposes; (b) permission for tribal members to obtain individual allotments before the land was officially opened to non-Indian settlers; and (c) reservation of the mineral resources for the tribe as a whole. 465 U.S. at 474. All three of these factors are present in the Osage Allotment Act. Unlike other allotment acts, the Act did not directly open the reservation to non-Indian settlement. With the exception of certain parcels of trust land reserved for the Osage Nation, the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement. As the Act did not open any land for settlement by non-Osage, there is no sum-certain or any other payment arrangement in the Act. And neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language. Thus, the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.

B. *Circumstances Surrounding Passage of the Act*

If the statute is ambiguous, we turn to the circumstances surrounding the passage of the act, in particular the manner in which the transaction was negotiated and its legislative history, for evidence of a contemporaneous understanding that the affected reservation would be diminished or disestablished as a result of the proposed legislation. *Solem*, 465 U.S. at 471. The Court sometimes considers whether there was tribal consent. *Compare DeCoteau*, 420 U.S. at 448 (the reservation was found to have been terminated, and the Court found importance in the

fact that the tribe consented to the agreement) *with Rosebud Sioux*, 430 U.S. at 587 (the reservation was disestablished although there was no tribal consent).

The manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished. The Act was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations. See Francis Paul Prucha, The Great Father 737-57 (1984) (Aplee. Supp. Add. 104-24). In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations. *See* H.R. Rep. No. 59-496, at 9, 11 (1906) (Aplee. Supp. Add. at 28, 30). While the Osage were excepted from the Dawes Commission process, the Osage felt pressure having observed the Commission's activities with respect to other tribes, and "[for several years, the Osage . . .ha[d] been considering the question of asking the Government to divide its lands and moneys among the members of the tribe." S. Rep. No. 59-4210, at 1 (1906) (Aplee. Supp. Add. at 42). In 1905, the Osage approached Congress to begin negotiating a bill "to abolish their tribal affairs and to get their lands and money fairly divided, among themselves, so that every individual will be there to give his views in the matter, and the majority agree upon a plan." 1 Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before the H. Subcomm. of the Comm. on Indian Affairs, 58th Cong. 8 (1905) ("Division

Hearings") (Aplt. Add. at 9). The Osage were "very anxious to bring about the allotment at the earliest possible time." 40 Cong. Rec. 3581 (1906) (Statement of Sen. Dillingham) (Aplee. Supp. Add. at 51). Congress and the Osage recognized that allotment may result in loss of much of the tribal land. *See, e.g.*, W. David Baird, The Osage People 68 (1972) (2 Aplt. App. at 237) ("James Bigheart and Black Dog, for example, noted that, like Indians of other tribes, the Osage may very well lose their allotments after dissolution of the reserve."). The Osage also recognized that the allotment process would terminate reservation status. 1 Division Hearings, at 6 (Aplt. Add. at 12) (statement of Black Dog, Osage Representative) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations.")

The Osage themselves presented an allotment act to Congress in February 1906, and by June of that year, Congress passed the Osage Allotment Act. Baird at 70 (2 Aplt. App. at 238). A primary concern during the negotiations was a desire to ensure that some tribal members were not unfairly enriched at the expense of other tribal members. These concerns were addressed by allotting land in several rounds, severing the mineral estate and placing it in trust for the tribe, and providing for a form of tribal government. *See, e.g.*, 1 Division Hearings, at 11-14, 55-56 (Aplt. Add. at 17-20, 54-55); Osage Allotment Act at §§ 2, 3, & 9. The Osage tried to prevent their land from becoming alienable through certificates of competency, but Congress rejected this approach. *See*

2 Division Hearings, at 4 (Aplt. Add. at 59). They also attempted to prevent a large portion of their lands, the surplus lands, from being taxed; this was also rejected by Congress. S. Rep. No. 59-4210, at 8 (Aplee. Supp. Add. at 49).

The legislative history and the negotiation process make clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act, and uncontested facts in the record provide further evidence of a contemporaneous understanding that the reservation had been dissolved. Historian Lawrence Kelly concludes that "[t]reatises and articles in professional journals that have considered the history of the former Osage Reservation have acknowledged that, after the Osage Allotment Act and Oklahoma's admission to the Union in accordance with the Oklahoma Enabling Act. the Osage Reservation no longer existed and that area became Osage County, a subdivision of the State of Oklahoma." Kelly Aff., ¶ 10 (2 Aplt. App. 244). Historian Francis Prucha has thoroughly discussed the United States' persistent efforts to end tribal control in the Indian Territory, which eventually became part of Oklahoma. Prucha at 738-57 (Aplee. Supp. Add. at 105-24). He notes, "The Indians of Oklahoma were an anomaly in Indian-white relations. . . . There are no Indian reservations in Oklahoma. . . . [T]he reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." Prucha at 757 (Aplee. Supp. Add. at 124). Another historian, Berlin Chapman, states that while Congress had established many reservations before

Oklahoma's statehood, "[t]he last of these reservations to be dissolved by allotments was that owned and occupied by the Osage[], embracing about 1,470,059 acres, now comprising Osage county." Berlin B. Chapman, *Dissolution of the Osage Reservation*, 20 Chrons. Okla. 244, 244 (1942) (1 Aplt. App. at 98). Historian W. David Baird concurs, stating "[w]ith their land allotted and their reserve an Oklahoma county . . . [the Osage] no longer existed as an independent people." Kelly Aff.,¶ 10 (2 Aplt. App. at 244) (quoting Baird at 72).

Instead of presenting evidence regarding widely held understanding of the Osage Allotment Act at the time it was passed, the Osage Nation primarily presents evidence of continued existence of their reservation contemporaneous to this litigation including: (1) the legislative history of the 2004 Osage Act, which refers to the Osage as a "federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma," H.R. Rep. No. 108-502, at 1 (2004); (2) the Assistant Secretary for Indian Affairs' certification of an Osage Tribe Liquor Control Ordinance in 2005, Aplt. Add. at 95-100; (3) a 2005 National Indian Gaming Commission opinion letter concluding that certain parcels of fee land in Osage County are part of the tribe's reservation, 1 Aplt. App. at 166-72; (4) a 1997 gubernatorial proclamation declaring October 25, 1997 as "Osage Day," 1 Aplt. App. at 174; (5) the 2005 compact between the Osage Nation and the state of Oklahoma authorizing the Nation to conduct gaming on its "Indian lands" which has resulted in the operation of casinos on fee lands in Osage County, Aplt. Add. at 101-03; (6) the Osage Nation's compacts with the

state regarding sharing of revenue from gaming activity and cigarette sales, Atkinson Aff. (2 Aplt. App. at 411-12); Mashunkashey Aff. (2 Aplt. App. at 414-15); (7) a "reservation" sign on a state highway, 1 Aplt. App. at 141; and (8) a map by the Dept. of the Interior and the U.S. Geological Survey depicting the boundaries of an Osage reservation as Osage County, 1 Aplt. App. at 182. Such evidence is too far removed temporally from the 1906 Act to shed much light on 1906 Congressional intent. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 420 (1994) (subsequent legislative record "is less illuminating than the contemporaneous evidence" because it does not contain "'deliberate expressions of informal conclusions about congressional intent [at the time of enactment]'").

C. *Post-enactment History*

The final factor used to determine Congressional intent to disestablish is subsequent events. Actions by Congress, the Bureau of Indian Affairs (BIA), and local authorities with regard to the unallotted open lands, "'particularly in the years immediately following the opening, ha[ve] some evidentiary value." *Solem*, 465 U.S. at 471. Express recognition of the continued existence of specific reservations by Congress in subsequent statutes, of course, supports the continued existence of a reservation. *See e.g., Seymour*, 368 U.S. at 356 (citing statues enacted 50 years after allotment); *Mattz*, 412 U.S. at 505. In contrast, a state's unquestioned exertion of jurisdiction over an area and a predominantly non-Indian population and land use supports a conclusion of reservation disestablishment. *Rosebud Sioux*, 430

U.S. at 604-05 ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use . . . demonstrates the parties' understanding of the meaning of the Act."). The Court has also explicitly focused on population demographics, noting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471 (acknowledging that this was an "unorthodox and potentially unreliable method of statutory interpretation," 465 U.S. at 472 n.13, but admitting a desire that the result be in some general conformance with the modern day balance of the area demographics, *id.* at 472 n.12).

The uncontested facts support disestablishment under this prong of the *Solem* test. After enactment, federal officials responsible for the Osage lands repeatedly referred to the area as a "former reservation" under state jurisdiction. For example, an annual report from the Superintendent to the Commissioner of Indian Affairs notes that his office "has experienced no difficulty maintaining order . . . . This duty, of course, falls to the County and State Officials." 2 Aplt. App. at 259 (1916 report); *see also* 2 Aplt. App. at 263 (1919 report) (same); 2 Aplt. App. at 268 (1920 report) ("Osage County, formerly Osage Indian Reservation, is organized under the constitution of the State of Oklahoma and the duty of maintaining order and enforcing the law is primarily in the hands of the County officials."); 2 Aplt. App. at 272 (1921 report) (same); 2 Aplt. App. at 276 (1922

report) (same). Such "'jurisdictional history' . . . demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421. *Compare Solem*, 465 U.S. at 480 (not finding diminishment where "tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing . . . the opened lands during the years following [the opening in] 1908") *with Hagen*, 510 U.S. at 421 (finding diminishment where "[t]he State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened").

In addition, uncontested population demographics demonstrate a dramatic shift in the population of Osage County immediately following the passage of the Osage Allotment Act. From the 1907 Special Census following the founding of Oklahoma to the 1910 Census, Osage County's population grew by a third. Glimpse Aff., ¶ 9 (2 Aplt. App. at 307-08); 2 Aplt. App. at 319-29 (census data for 1907, 1910, 1920, and 1930). By 1910, Osage Indians represented roughly six percent of the Osage County population. Glimpse Aff., ¶ 9 (2 Aplt. App. at 307- 08). From 1910 to 1920, the county's population grew by 82%, but the Indian population in the county (not limited to Osage Indians) dropped to roughly 3 percent. Glimpse Aff.,¶ 10 (2 Aplt. App. at 308). As of the 2000 Census, Osage County was 84% non-Indian, Osage Indians accounting for 3.5% of the county's population. Glimpse Aff., ¶ 14 (2 Aplt. App. at 309); 2 Aplt. App. at 331 (2000 population demographics map for Osage County).

Land ownership also dramatically shifted from tribal members to nonmembers through certificates of competency. By 1957, 1.1 million of the 1.4 million-acre county was alienated from trust/restricted status, Baird at 83 (2 Aplt. App. at 239), and as of 1972, just 231,070 acres remained in restricted ownership. 1 Aplt. App. at 89. As of 2008, the United States holds about 0.04% of the total land in Osage County in trust for the Osage Nation. Harwell Aff., ¶¶ 3-6 (2 Aplt. App. at 291-92). Like in *Hagen*. we think "[t]his 'jurisdictional history,' as well as the current population situation in [Osage County], demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421.

We conclude that the Osage reservation has been disestablished by Congress.[1] As a result, we need not reach whether tribal members who reside and earn

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[1] In reaching this conclusion, we have also carefully considered the other arguments raised by the Nation including: (1) that tribal, federal, and state sovereign authorities currently co-exist within the reservation's boundaries, Aplt. Br. at 19, 33-34; (2) that the district court improperly relied on judicial statements involving other tribes and reservations in Oklahoma, Aplt. Br. at 24; (3) that the district court improperly relied on "modern academic commentary of historians and demographers, post hoc commentary which has little probative value" and "is not subject to the legal standards applied by the Supreme Court," Aplt. Reply Br. at 11-12, Aplt. Br. at 24; (4) that the district court placed undue reliance on modern-day demographics, Aplt. Br. at 41-42; and (5) that the Defendants' 2000 census data is misleading and underrepresents the Osage, Aplt. Reply Br. at 16- 17. To the extent these arguments are not subsumed by our analysis, we are not persuaded.

income on fee lands located within the geographic boundaries of a reservation are exempt from state income tax. We also need not address the district court's application of laches to this case, although we note that the Nation concedes that Oklahoma has had a "long-standing practice of asserting jurisdiction" in Osage County. 2 Aplt. App. at 356. "[T]he longstanding assumption of jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations" that "merit heavy weight." *City of Sherrill*, 544 U.S. at 215-16 (internal quotation marks and citations omitted) (applying laches, acquiescence, and impossibility to preclude the Oneida Indian Nation's requested relief).

AFFIRMED.

The motion to withdraw as attorney filed by Kathryn L. Bass is GRANTED.

APPENDIX C
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.01-CV-
	)	516-JHP-
STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; DON KILPATRICK, Secretary-Member of the Oklahoma Tax Commission,	)	FHM
	)	
Defendants.	)	

ORDER

Now before the Court is Defendants' Motion for Summary Judgment (Dkt.# 79). Defendants initially filed a motion to dismiss (Dkt.# 72), under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) arguing: (1) the Court lacks subject matter jurisdiction over the Nation's claim for a judicial determination as to reservation status; and (2) the Nation has failed to adequately state a claim upon which relief may be granted. The Court converted Defendants' motion to

dismiss to a motion for summary judgment pursuant to Fed.R.Civ.P. 56 and provided the parties with additional time to present all materials made pertinent to such a motion. Plaintiff Osage Nation ("the Nation") has opposed the motions, and Defendants have filed Replies.

In its Second Amended Complaint ("Complaint"), the Nation seeks a declaratory judgment that its reservation boundaries have not been disestablished and that, as a matter of law, the Osage Reservation is Indian country within the meaning of 18 U.S.C. §1151. The Nation further seeks injunctive relief prohibiting Defendants from imposing and collecting taxes on the income of the Nation's members who both reside and earn income within reservation boundaries.

In general, summary judgment is proper where the pleadings depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id. at 249.*

In considering a motion for summary judgment, this court must examine the factual record and

reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988). In regard to the necessary burdens, however, the Supreme Court has instructed that:

> in cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file. Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by their own affidavits, or by the" depositions, answer to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Furthermore, if on any part of the prima facie case there is insufficient evidence to require submission of the case to the jury, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex, 477 U.S. at 323-24.*

Article III Jurisdiction

Defendants have asserted a federal jurisdictional challenge to the claims asserted by the Nation. Specifically, Defendants challenge the standing of the Nation to bring its claim regarding the status of its reservation against Defendants, as members of the Oklahoma Tax Commission.

When a court makes an inquiry as to a party's standing, the court must accept as true all material allegations of the complaint, and any other particularized allegations of fact, in affidavits or in amendments to the complaint. *Warth v. Seldin, 422 U.S. 490, 501 (1975).* "If, after this opportunity [to present facts to support standing], the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id. at 501-02.*

In its Complaint, the Nation alleges that its reservation boundaries were established by the Act of June 5, 1872, and that those reservation boundaries have never been disestablished by Congress. The Nation further alleges that the functions of its tribal government are carried out within its reservation and that, by virtue of its constitution, the Nation's jurisdiction and exercise of self-government extends to all lands within its reservation. The Nation does not seek to have this Court create or re-establish its reservation boundaries; rather, its claim against Defendants is based on allegations that its reservation continues to exist and that Defendants' present taxing activity against its tribal members located in the reservation violates federal law.

Thus, construing these material allegations as true, the Court finds the Nation has standing to challenge the actions of Defendants under well-established law prohibiting the state from imposing and collecting taxes on the income of a tribal member who both resides and earns that income within Indian Country. *See, e.g., Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Commission v. Citizen Band Potawatomie Indian Tribe of Oklahoma, 498 U.S. 505 (1991); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).*

Likewise, it is well-established that Indian tribes have standing to sue to protect sovereign or quasi-sovereign interests. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)(Indian tribe had standing as a tribe, apart from the claims of individual tribal members, to challenge legality of state motor vehicle tax); Prairie Band of Potawatomie Indians of Pierce, 253 F.3d 1234, 1241 (10th Cir. 2001)(Indian tribe had standing to sue State of Kansas to prevent interference with or infringement on tribe's right to self-government).* Therefore, the Court finds the Nation has adequately alleged Defendants' taxing activity within its reservation boundaries is an unlawful infringement on the Nation's sovereignty and right of self-government. Thus, Defendants' challenge to federal jurisdiction is overruled.

Introduction

In this case, the Nation mounts an unprecedented challenge, asserting that the income

of any Osage member who works and resides anywhere within Osage County is absolutely immune from state income taxation, even if that member works on privately owned fee land, not held in trust by the United States or subject to federal restraints on alienation (private fee lands), drives exclusively on state or county maintained roads to a home on private fee lands, has children attending state supported schools, and receives the great bulk of his or her social services from the State, not the Nation. Defendants' concern is expressed in the Joint Status Report:

> Because of its potentially far-reaching impact on the State of Oklahoma, this is one of the more important cases relating to state sovereignty and jurisdiction to arise since statehood in 1907. In this case, the Osage Nation seeks to divest the state of over 100 years of the exercise of sovereignty and jurisdiction over all of Osage County, the largest county in Oklahoma in area. If the Osage Nation were to prevail, precedent would be set potentially threatening the jurisdiction of the state as a whole, the counties, and local jurisdictions. If the Osage Nation's original reservation boundaries have not been disestablished, then a number of other tribes in Oklahoma could assert the same claim. The implications of this on the civil and criminal jurisdiction of the state are staggering, because this is a state that is largely made up of former Indian reservations.

(Dkt.# 66 Joint Status Report at 1-2.).

The Nation's Complaint requests two kinds of relief. First, the Complaint asks this Court to declare that all 2,296 square miles of Osage County comprise a reservation. Second, based upon the claim that the entire county should be declared a reservation, the Complaint seeks to prospectively enjoin the Commissioners, in their official capacities on behalf of the State of Oklahoma Tax Commission (Commission), from levying Oklahoma state income taxes upon the Nation's members who earn income and reside anywhere within the geographic boundaries of its alleged reservation - all of Osage County. The Complaint also seeks to support its claim by contending that a federal criminal statute, 18 U.S.C. § 1151, forecloses state taxation of all income earned within "Indian country."

Defendants contend they have not acted in excess of their authority under federal law, and have not violated federal law in imposing Oklahoma's income tax on incomes of members of the Osage Nation who neither earn income in employment nor reside on Trust, or Restricted Lands In Osage County. Further, Defendants argue that Osage County is not a reservation, and the tax is not preempted because the Nation cannot show specific federal statutes or established policies that foreclose the State's legitimate interest in securing revenues necessary to support its services to tribal members in predominantly non-Indian and non-Osage, Osage

County.[1] Specifically, Defendants allege the Osage Reservation, as created by the Act of June 5, 1872, was disestablished, dissolved, and no longer exists as provided by, and pursuant to, the intent of Congress. *See Hagen v. Utah, 510 U.S. 399, 410-411 (1994).* Defendants contend Congress' intent is reflected in:

(a) the statutory language used in the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 267 (the "Enabling Act"), and the Osage Allotment Act, Act of June 28, 1906, 34 Stat. 539 (the "Allotment Act"), by which Congress disestablished the Osage Reservation, providing, among other things, for taxation of the Osage and conversion of the reservation into a county, and subjecting the Osage to state law;

(b) the historical context surrounding the passage of the Enabling Act and the Allotment Act, see United States v. Mason, 412 U.S. 391, 396 n.7 (1973); Murphy v. Sirmons, 497 F. Supp. 2d. 1257, 1290 (E.D. Okla. 2007);

(c) the contemporaneous understandings surrounding the passage of the Enabling Act and the Allotment Act, which, reflect the influx of nonmember population and

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[1] Osage County population is 80% non-Indian and 95% nonmembers of the Nation, and less than one-sixth of Osage County remains in residential status. *See 2000 United States Census.*

recognition by federal officials of the former reservation status of the Osage Reservation in the years soon following those Acts, reinforce Congress' intent to disestablish the Osage Reservation; and

(d) even if the Osage Reservation was not disestablished, dissolved, and terminated pursuant to the Enabling Act and the Allotment Act, federal law does not preempt or otherwise bar the Commissioner Defendants from imposing Oklahoma's income tax on income of Osage members who neither earn income from employment on, nor reside on, Trust or Restricted Lands in Osage County, because State taxation, including income taxation, of such Osage members is expressly contemplated and permitted by federal law, including the Enabling Act and the Allotment Act. *See United States v. Mason, 412 U.S. 391, 396 n.7 (1973).*

Finally, Defendants argue the equitable defense of laches bars the Osage Nation's claims for declaratory and injunctive relief. The Osage Nation has left unchallenged the State's taxation of the income of its members for more than seventy years. The State would be prejudiced if declaratory or injunctive relief were now entered upsetting its long-standing taxation of the income of Osage members who neither reside on, nor earn income from employment on, Trust or Restricted Lands in Osage County. *See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005).*

Background

To be clear, this action does not concern taxation of tribal members living and earning income on trust or restricted lands in Osage County. Consequently, this case does not present the issues addressed in prior litigation concerning tribal members residing and working on trust or restricted lands. *See, e.g., Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).* Indeed, Defendants do not contest the right of Osage tribal members both earning income and residing on the limited, scattered parcels of trust or restricted lands within Osage County to be free from state income taxation. Instead, the Nation asks this Court to confirm the entirety of Osage County is a reservation, notwithstanding that Congress provided for the transfer or sale of the surface of all but a very few acres of Osage lands, thereby disestablishing any reservation more than a century ago. Premised upon its requested ruling confirming reservation status, the Nation then asserts that all tribal members who reside and work *anywhere* in Osage County are exempt from state income taxation, even if they neither reside nor work on trust or restricted lands, and irrespective of whether other factors material in prior preemption cases support state taxation.

These positions are contrary to long settled understandings and expectations concerning land status and principles governing federal preemption of state taxing jurisdiction. Since the allotment of the Osage Reservation and Oklahoma Statehood as enacted in 1906, Congress and the courts have repeatedly recognized there are no reservations in Oklahoma. As Congress recognized over seventy

years ago, [i]n Oklahoma the several Indian reservations have been divided up. . . as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen. . . is assuming his rightful position among the citizenship of the State." *S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added) cf., Murphy v. Sirmons, 497 F. Supp. 2d 1257,1290 (E.D. Okla. 2007) ("A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process.").*

The Nation's attempt to categorically exempt its members, who are Oklahoma citizens, recipients of Oklahoma services, and subject to Oklahoma laws, from state income taxation simply because they reside and work anywhere in Osage County disregards established law. Even within acknowledged reservations, exemptions from state tax have depended on specific factors establishing tribal and federal interests overriding a state's valid interest in raising revenue to support its services. The Nation fails to plead any such factors supporting preemption of Oklahoma's legitimate taxing interest.

Applicable policies, treaties and statutes reflect the unmistakable intent that Osage County is no longer a reservation. No federal policy exempts the Nation's members who both work and reside on non-trust, non-restricted lands within Osage County from Oklahoma state income tax -¬whether or not the

lands are a reservation. The Oklahoma Organic Act,[2] the Oklahoma Enabling Act,[3] and the Act for the Division of the Lands and Funds of the Osage Indian[4] ("Osage Allotment Act") reflect Congressional intent to subject the Nation, its members and its lands to Oklahoma law and to disestablish and terminate Osage County's reservation status. Further, neither the United States Supreme Court, nor any court, has held that the federal criminal law provisions of 18 U.S.C. § 1151 apply to immunize activities on Oklahoma private fee lands from state taxation. However, even if there remained an "Osage reservation," no federal policy erects a general barrier against income taxation of tribal members whose livelihoods and residences do not implicate trust or restricted land. The Court will not unsettle the jurisdictional understandings established by enactment over a century ago.

The Osage Reservation does not Remain Intact

The Oklahoma Organic Act, the Oklahoma Enabling Act, and the Osage Allotment Act, demonstrate the Osage reservation ceased to exist more than a century ago. A reservation consists of lands set aside under federal superintendence for the residence of tribal members. *See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 34 (1982 ed).* The 1906 Osage Allotment Act terminated the federal set-aside and federal superintendence of

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[2] Act of May 2, 1890, Ch. 182 § 1, 26 Stat. 81 (1890).

[3] Act of June 16, 1906, Ch. 3335, 34 Stat. 267 (1906).

[4] Act of June 28, 1906, Ch. 3572, 34 Stat. 539 (1906).

Osage County as the place of residence of Osage members. While that Act retained certain small tracts for tribal use and occupancy and reserved the minerals underlying Osage County for the Nation, the great majority of lands in Osage County were freed from restrictions on their alienability. Income that relates exclusively to those unrestricted private fee lands is the subject of this action. Whatever may be the status of the mineral estate and the islands of trust or restricted lands, the plain Congressional intent in 1906 was to terminate any reservation status as to surface estate lands in Osage County that were freed of restrictions on alienation.

The Supreme Court has articulated an analytical structure for determining when Congress disestablished a reservation. *Solem v. Bartlett, 465 U.S. 463, 470 (1984).* The most probative evidence of diminishment is the statutory language used to open the Indian lands. *Hagen v. Utah, 510 U.S. 399, 411 (1994).* The historical context surrounding the passage of the relevant act also informs the analysis. *Id.*

> When events surrounding the passage of[applicable statutes] particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish

> the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Solem, 465 U.S. at 471.

The language of the 1906 Osage Allotment Act and the surrounding historical circumstances establish Congress' plain intent to terminate the Nation's reservation and to subject the Nation, its members, and their non-restricted lands to Oklahoma law and Oklahoma courts. The Osage Allotment Act effected the transfer of nearly all Osage tribal lands to its members. The Act declared that the tribal lands of the Nation "shall be equally divided among the members of said tribe" by allowing each member to make three selections of 160 acres of land, with the remaining unselected lands divided equally among all members by an appointed commission. Osage Allotment Act §§ 1, 2.[5] "Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided . . . . Osage Allotment Act, § 2, Fourth. The

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[5] The Division Act limited such allotments and related rights to those on the official U.S. Government roll as of January 1, 1906, and certain of their children. Members so enrolled were known as headright owners. *See* Osage Allotment Act, §§ 1-4; *Quarles v. Dennison, 45 F.2d 585, 586 (10th Cir. 1930) (defining headright).* The roll so established constituted "the legal membership" in the Nation. Osage Allotment Act, § 1.

remaining selections would be "surplus land and shall be inalienable for twenty-five years," *Id.*, provided that any adult member could petition the Secretary of the Interior ("Secretary") to issue a "certificate of competency, authorizing [such member] to sell and convey any of the lands deeded him by reason of this act, except his homestead . . . . *Id.*, § 2; Seventh. Upon the issuance of the certificate of competency, "the lands of such member (except his or her homestead) shall become subject to taxation, and such member . . . . shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States." *Id.*

Other provisions of the Act reinforce the intent to terminate the reservation. "The Osage Boarding School reserve, . . . the reservoir reserve . . . , and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska" were reserved from selection but could be sold "under such rules and regulations as the Secretary of the Interior may provide." *Id.*, § 2, Tenth. The "United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which said buildings are situated, shall be sold to the highest bidder . . . " with the proceeds to be "placed to the credit of the

individual members of Osage tribe of Indians . . . ." *Id.*, § 2, Eleventh.[6]

Although the Osage Nation retained the beneficial interest in the minerals underlying the former Osage reservation area, that interest is contrasted starkly with the pattern divesting the surface, either directly or through authorizations for future sales, of all vestiges of tribal ownership. *See* Osage Division Act, §§ 2-4.[7] While the minerals underlying the former tribal lands were reserved to the Nation, all royalties received from such minerals were to be "placed in the Treasury of the United States to the credit of the members of the Osage tribe . . . and . . . . distributed to the individual members . . . .[8] Osage Allotment Act, § 4, Second. Consequently,

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[6] The Supreme Court has described the Government's plan for Osage members under the 1906 Division Act. *See Choteau v. Burnet, 283 U.S. 691, 694 (1931) ("This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes."); see also Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 579 (1928) (same, regarding Creek tribal members).*

[7] Of the total original Osage lands comprising over 1.47 million acres, all were allotted except 645.34 acres retained by the tribe and 4,575.49 acres reserved for town sites, schools, cemeteries and federal agency purposes(with those lands generally subject to sale). *See* Report of Subcommittee on Indian Affairs, Osage Nation of Indian Judgment Funds at 18 *accompanying* S. 1456 and S. 3234 (March 28, 1972). As of 1972, of the 1,464,838.5 acres that were originally allotted, only 231,070.59 acres remained in restricted status. *Id.*

[8] The retention of a subsurface mineral interest for the benefit of the Nation's members does not render the entirety of Osage County a reservation. The term reservation refers to land set aside under federal protection for the residence of tribal

the Nation stood as recipient of those funds solely for the benefit of the allottee members.

Although the Act contemplated a continuing tribal government, it left few powers to exercise. All moneys received from the sale of terminated reservation land, as with the royalties from minerals, were held as property of individual members. Osage Allotment Act, § 4, First. Public highways could be established within the "Osage Indian Reservation" lands without any compensation therefore." Osage Allotment Act, § 10. Although the Act mentions the "Osage Indian Reservation," as do some subsequent enactments, it plainly does so only to describe a known geographic area. Given that the Enabling Act, earlier in the same month, had subjected the Osage lands to Oklahoma law and courts, the Division Act left little role for a general tribal government over a "reservation" area. Despite the Complaint's assertion that it arises under the Act of June 28, 1906, the Osage Allotment Act, the Act does not support this contention. The termination of Osage reservation

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Indians. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 34 (1982 ed.). The mineral retention did not preserve the surface estate for the residence of Osage members and cannot continue or establish a reservation. *See Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1267 (10th Cir. 2001) (land reserved by the government to preserve the tract s status as a tribal burial ground did not make that land a reservation, as it was not reserved for or used for purposes of residence). Similarly, *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007), expressly rejected the contention that an "unobservable," partial mineral interest could support "Indian country" status for the surface of those lands.

status was part of a broader pattern of reservation termination accompanying Oklahoma s entry into the Union.

During the late 1890s and early 1900s, Congress systematically negotiated or legislated transfers of tribal lands to tribal members and the opening of unallotted lands to settlement and entry by non-Indians. *See generally, II FRANCIS PAUL PRUCHA, THE GREAT FATHER, 735-757 (1984) ("Prucha").* Thirteen Indian reservations were in Oklahoma Territory as established by an act of Congress on May 2, 1890. The last of these reservations to be dissolved by allotments was that owned and occupied by the Osage, embracing about 1,470,059 acres, now comprising Osage County; *see also B. B. Chapman, Dissolution of the Osage Reservation, 20 Chronicles of Oklahoma 244 (1942).* Francis Paul Prucha, "widely considered the leading historian of federal Indian policy," has concluded that, as a result of this history: "There are no Indian reservations in Oklahoma . . . and the reservation experience that was fundamental for most Indian groups in the Twentieth Century was not part of Oklahoma Indian history." PRUCHA at 757. Recently, the U. S. District Court for the Eastern District of Oklahoma reached the same conclusion in *Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007).*

The language of the Oklahoma Enabling Act and its incorporation of the Oklahoma Organic Act support the conclusion that there are no Indian reservations in Oklahoma. The Act of March 3, 1885, Ch. 341, 23 Stat. 362 (1885), which applied to territories generally, was made applicable by passage

of the Oklahoma Organic Act to the Oklahoma Territory upon its formation in 1890. Section 9 of the 1885 Act provided that any Indian committing a crime within any of the Territories of the United States shall be subject to the laws of the Territory and be subject to the same punishment as a non-Indian. 23 Stat. 362, 385. The Oklahoma Organic Act, Ch. 182, 26 Stat. 81 (1890), § 11 generally made laws of the state of Nebraska applicable throughout the Oklahoma Territory. Under the Organic Act, the Territorial courts had jurisdiction over crimes involving Indians, whether or not the crime occurred on Indian lands. The Territorial courts were given jurisdiction over all cases involving Indians, except controversies between members of the same tribe, while maintaining their tribal relations. Organic Act, § 12.

This broad jurisdiction over tribes and their members under the Organic Act was carried forward under § 20 of the Enabling Act. The Oklahoma Enabling Act, Ch. 3335, 4 Stat. 267, §13, provided that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof. Consequently, Territorial law subjecting all residents, regardless of race or ethnicity, to the same courts and making them subject to the same penalties was extended over all Oklahoma Indians, including the Nation, upon Statehood.[9] Accordingly,

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[9] The Complaint cites a disclaimer provision of § I of the Enabling Act. However, such provisions pertain to retained tribal lands, not the unrestricted lands involved here. *See, e.g.*,

the Oklahoma Enabling Act also does not support the Nation's claim for relief.

These provisions have led to the understanding that Oklahoma reservations were disestablished. As stated in *Murphy v. Sirmons* with respect to the *Muscogee (Creek) Nation*, "State laws have been applied over the lands within the boundaries of the Creek nation for over a hundred years. *Murphy v. Sirmons*, 497 F. Supp. 2d at 1290. "The Organic and Enabling Acts confirm that . . . Indian reservations do not exist in Oklahoma." *Id.* at 1289-1290.

Contemporaneous consensus at the time also reflected the understanding that the Acts divested Oklahoma tribes of both title and jurisdiction through land transfers authorized by contemporaneous legislation, and that Oklahoma law would apply to all civil matters occurring on former Indian lands. *Cf., Montana v. United States,* 450 U.S. 544, 559 n. 9 (1981) (allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.).[10] Section 21 of the Enabling Act specified that the former Osage reservation should constitute a separate county, and that Oklahoma's constitutional convention shall designate the county seat and provide rules and regulations

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Indian Country USA, Inc. v. Okla, 829 F.2d. 967, 976-81 (10th Cir. 1987).

[10] The Supreme Court observed in *United States v. Oklahoma Gas & Elec. Co.*, 127 F.2d 349, 353 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), that it is common knowledge that lands allotted in severalty in Oklahoma are essentially a part of the [non-Indian] community in which they are situated . . . ."

and define the manner of conducting the first election for officers in said county. The Supreme Court recognized that Osage history distinguished the Nation from tribes like the Navajo Nation in *United States v. Mason, 412 U.S. 391 (1973)*. Mason held the United States had no duty to resist payment of Oklahoma inheritance tax on unrestricted interests in an Osage deceased member's estate. The *Mason* Court distinguished *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973)*, because *McClanahan* had contrasted the trust land of the Navajo Reservation with the status of the Osage as described in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), observing "that 'the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community.'" *Mason, 412 U.S. at 396n.7.*

Subsequent Congressional enactments further confirm Congress' intent and contemporaneous understanding that there were no remaining reservations in Oklahoma. The legislative history of the Oklahoma Indian Welfare Act, Ch. 831, 49 Stat. 1967 (1936), a statute central to defining an Oklahoma tribes' status, provides: [i]n Oklahoma the several Indian reservations have been divided up . . . as a result of this program, ***all Indian reservations as such have ceased to exist*** and the Indian citizen . . . is assuming his rightful position among the citizenship of the State. S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added). In a Senate report accompanying a 1974 amendment to the Federal Property and Administrative Services Act, the Report explained: The Committee amendment to

H.R. 8958 adds a provision that will extend the same disposal authority for excess land in Oklahoma that is provided by the bill for the rest of the United States. ***This provision is necessitated by the fact that there are no reservations in Oklahoma***." *S. Rep. No. 93 -1324, 93rd Cong., 2nd Sess. 2 (Dec. 11, 1974) (emphasis added).* Under *Solem v. Bartlett*, those understandings are entitled to great weight. *See Shawnee Tribe v. United States, 423 F.3d 1204, 1227 (10th Cir. 2005) ("we may not ignore the plain language of the instrument that 'viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims.'")(citation omitted); Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1020 (8th Cir. 1999) ("It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements, context has been found to play a similarly important role in interpreting the language of the surplus land acts.").*

Income of Tribal Members Working and Living on Private Fee Lands in Osage County is not Exempt from Taxation — Federal Common Law

The Complaint arises under several bases in federal law, including federal treaties, statutes and federal common law. However, none of these sources support the claim that tribal members working and living anywhere within Osage County are immune from Oklahoma income tax. Consequently, the focus is on the Nation's assertion that federal common law governing tribal immunity from state taxation preempts Oklahoma's taxation authority.

The Nation seeks to immunize all tribal members in Osage County from income tax if they both live and earn income in Osage County irrespective of the actual status of the land on which the members reside, and the actual source of that income. Federal common law with respect to the preemption of state income taxation of reservation Indians does not support such a broad claim.[11] *See McClanahan v. Ariz. State Tax Comm n, 411 U.S. 164 (1973).* In *McClanahan*, the United States Supreme Court analyzed treaties and statutes applicable to the trust land of the Navajo Nation before concluding Arizona's taxation was preempted. *McClanahan's* holding, however, was premised on the fact the Court was dealing with a reservation. Therefore, *McClanahan*, merely established that a tribal member who resided on a recognized reservation, and whose income was derived wholly from reservation sources, was exempt from state income taxation. *Id. at 179. McClanahan* never established either an exemption applying categorically to all tribal members residing in Indian country, or an exemption which applied, regardless of the source of the tribal member's income.

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[11] *See Dep't of Tax. & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 69 (1994) (challenge to tribal taxation) ("Respondents' challenge to New York s regulatory scheme is essentially a facial one. In reviewing a challenge of this kind, we do not rest our decision on consequences that, while possible, are by no means predictable. ...[W]e confine ourselves to those alleged defects that inhere in the regulations as written.") The facial challenge the Nation presents here is whether all members living and earning income on fee lands within Osage County are absolutely immune from tax.

Further, although the Supreme Court has referenced Indian country status as supportive of tribal immunity from state taxation, *see Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993)*, its cases do not support the notion that all lands described by the subparagraphs of 18 U.S.C. § 1151 are automatically immunized from state taxation. To the contrary, while "Indian country" status under 18 U.S.C. § 1151 has been deemed pertinent in some instances, the Court has in each case considered other factors in determining state taxing powers.

Application of the Indian country analysis to address taxation has required lands to satisfy two requirements: "first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998)(addressing dependent Indian community subcategory of Indian country.")*. The Court's most recent reference to the pertinence of the federal criminal code in civil matters, *Atkinson Trading Co. v. Shirley, 532 U.S. 654 (2001)*, reversed the Tenth Circuit's determination that the Navajo Nation could tax Atkinson's fee lands operation within the boundaries of the Navajo Nation under the language of 18 U.S.C. § 1151(a) defining Indian country as lands within the limits of an Indian reservation, notwithstanding the issuance of any patent . . ." The Court made plain that "Indian country" status is not dispositive if there is no "claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over non-members on non-Indian fee land." 532 U.S. at 653 n.5. Under

the same analysis, given that there is no claim Congress expressly immunized tribal members' incomes in "Indian country" from state taxation, Section 1151 simply does not address an Osage tribal member's claimed immunity from state income taxation.

Also, probative of the issue is the tribes' diminished power over fee lands and enhanced state powers over such lands. Income derived from fee land sources is akin to income derived outside the tribe's jurisdiction, which is subject to taxation. Indeed, in *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980)*, the Supreme Court contrasted the taxability of cigarettes marketed by the smoke shops to persons outside Indian country, and which value was not generated on the reservation, with the claim of the tribal member in *McClanahan* who derived all her income from reservation sources. The *Colville* Court rejected the notion that a tribe could exploit "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [to] authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* Instead, the Court found, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id. at 157.*

Under a preemption analysis, income of a tribal member resident on fee lands earned from sources in which the Nation does not have a significant interest,

i.e., from employment with the State or a non-member enterprise or entity, even in Osage County (assuming it were a reservation), would be subject to state income tax. The Nation fails to address whether tribal interests, or federal interests that could give rise to preemption under federal law, are implicated when tribal members earn income on fee lands and drive across state highways to a home on fee lands. The Complaint fails to articulate a single federal interest that conflicts with Oklahoma income taxation of such members.

As applied to the unique and uncommon history of Oklahoma tribes, and the Osage Nation in particular, these principles do not oust or preempt Oklahoma's income taxation challenged here. *See Oklahoma Tax Comm n v. United States, 319 U.S. 598 (1943).* In holding that portions of the estates of deceased members of the Five Civilized Tribes are subject to Oklahoma estate taxation, the Oklahoma Tax Commission Court recognized that principles applicable to Indians elsewhere in the United States do not apply directly to Oklahoma Indians: "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy . . . [T]hey are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and [express] tax exemptions." *319 U.S. at 603.* The Court distinguished the sovereignty principles laid down in *Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1831),* where "the Indian tribes were separate political entities with all the rights of independent status – a condition which has not existed for many years in the State of Oklahoma." *319 U.S. at 602.* Recognizing

that Oklahoma supplies "schools, roads, courts, police protection, and all the benefits of an ordered society . . . " to the tribal members involved in the case, and that an income tax, based solely on ability to pay . . . ,"[12] is not an unreasonable burden, *Id. at 609*, the Court upheld Oklahoma's taxes on the restricted cash and securities in the tribal members' estates, but disallowed only the tax on statutorily restricted allotment lands, which the statute expressly rendered expressly "restricted and tax exempt." *Id. at 611.*

With respect to Osage lands in Osage County, the Supreme Court long ago recognized the Congressional intent that such lands be subject to state taxation. *See McCurdy v. United States, 246 U.S. 263, 269-70 (1918) (once restrictions on Osage lands were removed pursuant to the Act of June 28, 1906, former Osage restricted lands became subject to state taxation).* In *Choteau v. Burnet, 283 U.S. 691, 695-96 (1931)*, the Court reasoned similarly that an Osage allottee's income from oil and gas royalties after the removal of restrictions under the 1906 Osage Act is subject to federal income tax. "His shares of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that any citizen of the United States."

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[12] The Court also noted the substantial wealth of members of the Osage Tribe. *Id.* at 609 n.13.

Id. [13] With respect to the Osage, Oklahoma's Congressional delegation has expressly acknowledged that funds and securities, income, and estates of these Osage Indians are subject to taxation, the same as for other citizens. *Hearing before the Subcommittee on Indian Affairs on H. Con. Res. 108 (July 22, 1953), Statement of Oklahoma Members in Congress.* Osage unrestricted fee lands, and income related to them, are presumptively subject to state taxes.

The Major Crimes Act

The Supreme Court requires a tribe alleging claims under federal common law to "articulate what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state [law]." *See Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty., 538 U.S. 701, 712 (2003).* Just as in *Inyo County*, it is unclear what federal law, if any, the Tribe's case "aris[es] under." *Id (quoting 28 U.S.C. § 1331) (brackets in original).* The Nation's citation to a federal criminal statute and cases pertaining to trust or restricted lands affords no specific support.

Given the requirement of a prescription of federal law, *see Id.*, 18 U.S.C. § 1151 is not a federal law that

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[13] The Court relied on § 2, Seventh, of the Osage Allotment Act, Ch. 3572, 34 Stat. 539 (1906): "upon the issuance of such certificate of competency, the lands of such member (except his or her homestead) shall become subject to taxation, and such member shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

the Nation's case arises under. In addition to defining federal criminal powers, that statute "confer[s] upon Indian tribes jurisdiction over certain criminal acts occurring in 'Indian country.'" *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.5 (2001).* The statute's legislative history confirms that it was intended to codify prior case law governing jurisdiction to prosecute crimes in Indian country. *See Report of Judiciary Committee accompanying H. R. 3190, 80th Cong., 1st Sess. (April 24, 1947) at A-91, A-92.* It does not establish civil immunities from state taxation.

The Supreme Court's references to 18 U.S.C. § 1151 in prior cases do not support a different result. *Okla. Tax Comm n v. Sac & Fox Nation, 508 U.S. 114 (1993),* does not address taxation on fee lands within an alleged reservation. Rather, it reversed a decision in which the lower courts construed *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973),* as immunizing tribal members income from State taxation whenever the income was derived from tribal employment on tribal trust lands, and specifically required that the member also live on trust land: "*The residence of a tribal member is a significant component* of the McClanahan presumption against state tax jurisdiction." *Sac & Fox, 508 U.S. at 123 (emphasis added).* Although *Sac & Fox* contains some broad language, it narrowed the scope of available immunity to tribal members living and working on land set aside for those members. *Id. at 124.* The *Sac & Fox* Court s discussion of *Oklahoma Tax Comm n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 511 (1991),* while employing broad language regarding Indian country, again emphasized that the case concerned a tribal

convenience store located outside the reservation on land held in trust for the Potawatomi. *508 U.S. at 125 (emphasis added).* Thus, while the Court in *Sac & Fox* and *Citizens Band* referred to Section 1151, neither case addressed tax immunity with respect to tribal members both working and residing on fee lands. Indeed, subsequent to both those decisions, the Supreme Court ruled that Oklahoma may tax the income of tribal members who earn income working for the tribe on tribal lands, but who live outside Indian country. *See Oklahoma Tax Comm n v. Chickasaw Nation, 515 U.S. 450, 464 (1995).* Given that holding, the Nation cannot establish that state income taxation is foreclosed when the taxpayer neither works nor lives on restricted lands.

While the Supreme Court has occasionally said Section 1151 *generally* applies to questions of civil jurisdiction, the cases have carefully couched such language in nonmandatory terms. *DeCouteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975) (emphasis added); see also Alaska v. Native Village of Venetie, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking. . .").* Rejecting any contention that "Indian country" status prescribes mandatory civil tax consequences, the Supreme Court in *Atkinson Trading Co. v. Shirley, 520 U.S. at 654*, expressly rejected applying Section 1151 to require a nonmember to pay Navajo Nation taxes on fee lands within an undisputed, treaty-based reservation.[14] In

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[14] Cases such as the Tenth Circuit s decision in *Pittsburgh & Midway Coal Mining Company v. Watchman*, 52 F.3d 1531, 1540 (10th Cir. 1995), which rejected the argument that Section

fact, given the disestablishment of the Osage and other Oklahoma reservations long before the Indian country statute was codified, using the 1948 statute to exempt Osage members from state income tax is particularly anomalous. *See, e.g., Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999) ("Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definition of Indian country, and the intentions of that Congress . . . are what we must look to here.").* Considering the context of sovereignty pertinent to state taxation of tribal members, and Congress' understanding in 1906 that Osage members were citizens of Oklahoma for taxation and other purposes, 18 U.S.C. § 1151 creates no rights that may be asserted by such members – or by the Nation in this action.

Longstanding Reliance by the State of Oklahoma Is a Significant Factor Counseling Against a Decision Altering Jurisdictional Assumptions.

The ability to raise revenues to support its services to Osage County lands and the tax status of Osage tribal members is of critical importance to Oklahoma. If this Court were to now establish Osage County as a reservation more than a century after

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1151 applies only to criminal jurisdiction, could not take into account the Supreme Court's subsequent guidance in *Atkinson*. They do not address whether federal policies preempt a state's ability to tax income in circumstances that do not implicate substantial federal interests.

Congress was understood to have dissolved that status *and* that such status automatically deprives Oklahoma of the ability to fund services in Osage County through income taxes, the State's provision of services would be severely threatened. Such a ruling would also affect the State's Sovereign rights, the State's jurisdiction over its citizens, and critical revenue, across a broad piece of land in which Congress has previously recognized the State has a right to exert its dominion. See Enabling Act, Ch. 3335, 34 Stat. 267 (1906), § 11.

Such a result would contravene substantial reliance interests, as did a similar claim affecting riverbed rights in Idaho: "[The Tribe's claim] is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 282 (1997). Similarly, standards of federal Indian law and federal equity practice preclude the Nation from advancing its claims here. *City of*

Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214 (2005). In *City of Sherrill*, the Court ruled that equitable considerations of laches, acquiescence and impossibility barred the Oneida Tribe's claim that it could exercise sovereign control over lands within the boundaries of the tribe's former reservation and avoid payment of city property taxes.

Oklahoma has governed Osage County as a county for over 100 years. The County is predominately non-Indian and non-Osage. [15] The Osage have not sought to reestablish their claimed reservation or to challenge the State s taxation until recently. Recognizing Osage County as a reservation and ousting Oklahoma income taxation over Osage members would have significant practical consequences not only for income taxation, but potentially for civil, criminal and regulatory jurisdiction in Osage County.

Accordingly, Defendants' Motion for Summary Judgment is granted.

/s/ James H. Payne
James H. Payne
United States District Judge
Northern District of Oklahoma

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[15] According to the 2000 United States Census, Osage County had a population of 44,437, of whom 9,209 (or 20.7%) identified themselves as being American Indians, in whole or in part. The number of inhabitants of Osage County who identified themselves as Osage Indians, in whole or in part, was 2,403 (or 5.4% of the population of Osage County).

APPENDIX D

CHAP. 3572.—An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided,* That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable,

shall carefully investigate such cases and stall determine which of said persons, if any, are entitled to enrollment: but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal for the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; and the adult members shall select their first selections and file notice of the same with the United States Indian agent for the Osages within three months after the approval of this Act: *Provided*, That all selections of lands heretofore made by any member of said tribe, against which no contest is pending, be, and the same are hereby, ratified and confirmed as one of the selections of such member. And if any adult member fails, refuses, or is unable to make such selection within said time, then it shall be the duty of the United States Indian agent for the Osages to make such selection for such member or members, subject to the approval of the Secretary of the Interior. That all said first selections for minors shall be made by the United States Indian agent for the Osages, subject to the approval of the Secretary of the Interior: *Provided*, That said first elections for minors having parents may be made by said parents, and the word "minor" or "minors" used in this Act shall be held to mean those who are under twenty-one years-of age: And provided further, That all children born to members of said tribe between January first, nineteen hundred and six, and the first day of January, nineteen hundred and seven, shall have their selections made for them within six months after approval of this Act, or within six

months after their respective births. That all children born to members of said tribe on and after the first day of January, nineteen hundred and seven, and before the first day of July, nineteen hundred and seven, shall hare their selections made for them on or before the last day of July, nineteen hundred and seven, the proof of birth of such children to be made to the United States Indian agent for the Osages.

Second, That in making his or her first selection of land, as herein provided for, a member shall not be permitted to select land already selected by or, in possession of, another member of said tribe as a list selection, unless such other member is in possession of more land than he and his family are entitled to for list selections under this Act; and in such cases the member in possession and having houses, orchards, barns, or plowed land thereon shall have the prior right to make the first selection: *Provided*, That where members of the tribe are in possession of more land than they are entitled to for first selections herein, said members shall have sixty days after the approval of this Act to dispose of the improvements on said lands to other members of the tribe.

Third, After each member thus selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection.

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall he permitted to make a third selection of one hundred and sixty

acres of land in the manner herein provided for the first and second selections: *Provided*, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot." Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

Sixth. The selection and division of lands herein provided for shall be made under the supervision of, or by, a commission consisting of one member of the Osage tribe, to be selected by the Osage council, and two persons to be selected by the Commissioner of Indian Affairs subject to the approval of the Secretary of the Interior; and said commission shall settle all controversies between members of the tribe relative to said selections of land; and the schedules

of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior. The surveys, salaries of said commission, and all other proper expenses necessary in making the selections and division of land as herein provided shall be paid by the Secretary of the Interior, out of any Osage funds derived from the sale of town lots, royalties from oil, gas, or other minerals, or rents from grazing land.

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided*, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: *Provided*, That, the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress; *And provided further*, That nothing herein shall authorize the sale of the oil, gas, coal, or

other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

Eighth. There, shall be reserved from selection and division, as herein provided, one hundred and sixty acres on which the Saint Louis School, near Pawhuska, is located, and the one hundred and sixty acres on which the Saint John's School, on Hominy Creek, Osage Indian Reservation, is located, said tracts to conform to the public surveys; and said tracts of land are hereby set aside and donated to the order of the Sisters of Saint Francis; and said tracts shall be conveyed to said order, the Sisters of Saint Francis, as early as practicable, by deed. There shall also be reserved from selection and division forty acres of land near Gray Horse, to be designated by the Secretary of the Interior, on which are located the dwelling houses of John N. Florer, Walter O. Florer, and John L. Bird; and said John N. Florer shall be allowed to purchase said forty acres at the appraised value placed thereon by the Osage Allotting Commission, the proceeds of the sale to be placed to the credit of the Indians and to be distributed like other funds herein provided for.

Ninth. There shall be reserved from selection and division, as herein provided, the northeast quarter of section three, township twenty-five, range nine east,

of the Indian meridian, and one hundred and sixty acres to conform to the public survey at the town of Gray Horse, including the Government doctor's building, other valuable buildings, and the cemetery, and the one hundred and sixty acres to conform to the public survey, adjoining or near the town site of Hominy; said lands or tracts are hereby set aside, for the use and benefit of the Osage Indians, exclusively, for dwelling purposes, for a period of twenty-five years from and after the first day of January, nineteen hundred and seven: *Provided*, That said land may, in the discretion of the Osage tribe, be sold under such rules and regulations as the Secretary of the Interior may prescribe; and the proceeds of the same under such sale shall be apportioned and placed to the credit of the individual members of the tribe according to the roll herein provided for.

Tenth. The Osage Boarding School reserve of eighty-seven and five-tenth acres, and the reservoir reserve of seventeen and three-tenths acres, and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska, as shown by the, official plat of the same, are hereby reserved from selection and division as herein provided; and the same may be sold in the, discretion of the Osage tribe, under such rules and regulations as the Secretary of the Interior may provide; and the proceeds of such sale shall be apportioned and placed to the credit of the individual members of said tribe according to the roll herein provided for.

Eleventh. That the United States Indian agent's office building, the Osage council building, and all

other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which the said buildings are situated, shall be sold to the highest bidder as early as practicable, under such rules and regulations as the Secretary of the Interior may prescribe; and with the proceeds he shall erect other suitable buildings for the uses mentioned, on such sites as he may select, the remaining proceeds, if any, to be placed to the credit of the individual members of the Osage tribe of Indians: *Provided*, That the house known as the chief's house, together with the lot or lots on which said house is located, and the house known as the United States interpreter's house, in Pawhuska, Oklahoma Territory, together with the lot or lots on which said houses are located, shall be reserved from sale to the highest bidder and shall be sold to the principal chief of the Osages and the United States interpreter for the Osages, respectively, at the appraised value of the same, said appraisement to be made by the Osage town-site commission, subject to the approval of the Secretary of the Interior.

Twelfth. That the cemetery reserve of twenty acres in the town site of Pawhuska, as shown by the official plat thereof, is hereby set aside and donated to the town of Pawhuska for the purposes of sepulture, on condition that if said cemetery reserve of twenty acres, or any part thereof, is used for purposes other than that of sepulture, the whole of said cemetery reserve of twenty acres shall revert to the use and benefit of the individual members of the Osage tribe, according to the roll herein provided, or to their heirs; and said tract shall be conveyed to the said town of Pawhuska, by deed, and said deed shall

recite and set out in full the conditions under which the above donation and conveyance are made.

That the provisions of an Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," approved March third, nineteen hundred and five, relating to the Osage Reservation, pages one thousand and sixty-one and one thousand and sixty-two, volume thirty-three, United States Statutes at Large, be, and the same are hereby, continued in full force and effect.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of laud herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however*, That

nothing herein contained shall be construed as affecting any valid existing lease or contract.

SEC. 4. That all funds, belonging to the Osage tribe, and all moneys due, and all moneys that, may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misued or squandered he may withhold the payment of such interest: *And*

provided further, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

Second. That the royalty received from oil, gas. coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases, and moneys received from the sale of

town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and an emergency fund for the Osage tribe, which shall be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall he the absolute property of the individual members of the Osage tribe, according to the roll herein provided for. or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

SEC. 6. That the lands, moneys, and mineral interests, herein provided for of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their

heirs, as herein provided: and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further*, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

SEC. 8. That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior.

SEC. 9. That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise,

the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined.

SEC. 10. That public highways or roads, two rods in width, being one rod on each side of all section lines, in the Osage Indian Reservation, may be established without any compensation therefor.

SEC. 11. That all lands taken or condemned by any railroad company in the Osage Reservation, in pursuance of any Act of Congress or regulation of the Department of the Interior, for rights of way, station grounds, side tracks, stock pens and cattle yards, water stations, terminal facilities, and any other railroad purpose, shall be, and are hereby, reserved from selection and allotment and confirmed in such railroad companies for their use and benefit in the construction, operation, and maintenance of their railroads: *Provided*, That such railroad companies shall not take or acquire hereby any right or title to any oil, gas, or other mineral in any of said lands.

SEC. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

Approved, June 28,1906.

179 (3)

No. 10-537

IN THE

Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

I. Whether, notwithstanding compelling statutory text reflecting congressional intent to disestablish an Indian reservation, supported by undisputed evidence of (1) circumstances surrounding the dispositive act, (2) subsequent events immediately following the act's passage, and (3) longstanding unchallenged recognition of State jurisdiction, the decisions of this Court or any Circuit require a decision that the reservation remains intact solely because the act does not meet a newly-proposed "plain statement" standard, requiring express disestablishment language.

II. Whether, in addressing evidence of "events that occurred after passage" of an act under the analysis prescribed in *Solem v. Bartlett*, 465 U.S. 463 (1984), for determining whether a reservation was disestablished, a decision holding a reservation disestablished based on statutory language, undisputed evidence of contemporaneous understandings, and events immediately following the dispositive act, and longstanding recognition of State jurisdiction conflicts with the decisions of this Court or any Circuit solely because it did not accord dispositive weight to recent administrative references to a "reservation."

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INTRODUCTION

More than 70 years ago, this Court held the State of Oklahoma may tax the income of an Osage Nation member derived within Osage County. *See Leahy v. State Treasurer of Okla.*, 297 U.S. 420, 421 (1936). Since *Leahy*, this Court has repeatedly reaffirmed Oklahoma's taxation of Osage members in Osage County.[1] Now, nearly a century after passage of the Osage Division Act[2] ("Division Act"), the Osage Nation challenges the same tax this Court upheld in *Leahy*, asserting all of Osage County, Oklahoma, remains a reservation. The Court of Appeals' well-reasoned opinion ("Opinion") correctly rejected the Nation's effort, holding that the Division Act, complemented by the contemporaneous Oklahoma Enabling Act[3] ("Enabling Act"), reflected Congress' intent to strip the Osage Tribe of tribal properties, transmute the Osage Reservation into Osage County, Oklahoma, and thereby disestablish the Reservation. In this case, addressing only privately owned fee lands, and not the few remaining trust or restricted lands, the courts below correctly declined to overturn more than a century of reliance on the understanding that the Reservation had been disestablished and reaffirmed Oklahoma's ability to tax income of Osage members who neither work nor reside on trust or restricted lands in Osage County.

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[1] *United States v. Mason*, 412 U.S. 391, 397 (1973) (Oklahoma estate tax); *West v. Okla. Tax Comm'n*, 334 U.S. 717, 726 (1948) (same); *Chouteau v. Burnet*, 283 U.S. 691, 695-96 (1931) (federal income tax).

[2] Ch. 3572, 34 Stat. 539 (1906) ("An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory and for other purposes.").

[3] Ch. 3335, 34 Stat. 267 (1906).

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This case was decided on the Alternative Motion for Summary Judgment of the Respondents, Constance Irby, Thomas E. Kemp, and Jerry Johnson,[4] Commissioners of the Oklahoma Tax Commission ("Commissioners"), supported by affidavits of a prominent historian, a demographer, and an expert on pertinent land records. In response, Petitioner submitted no contradictory affidavits and did not object to the Commissioners' evidence. Later, Petitioner filed an untimely motion to strike portions of the Commissioners' evidence, which the district court denied in material part. Petitioner did not appeal that decision. C.A. Supp. App. 65.[5] Consequently, the undisputed record before the Court of Appeals established that the evidentiary factors this Court requires be considered, *see Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), point unequivocally to disestablishment.

The district court, recognizing the case concerned only taxation arising from fee lands, Pet. App. 33a, analyzed extensively the text of the Division Act, which "retained certain small tracts for tribal use and occupancy," but "transferred nearly all

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[4] The caption of the Opinion below and of the Petition incorrectly identify Respondent Jerry Johnson as "Warden" and as "Vice-Chairman" of the Commission. The title, "Warden," is incorrect.

[5] This brief cites to the record before the Tenth Circuit as follows: "C.A. App." (Appendix for Appellant); "C.A. Add." (Addendum for Opening Brief of Appellant); and "C.A. Supp. App." (Appellees' Supplemental Appendix); C.A. Supp. Add. (Appellees' Supplemental Appendix). Citations to the Appendix attached to the Petition are "Pet.App."

tribal lands to its members." *Id.* at 36a. Most allotted lands were "surplus lands," and, upon issuance of a certificate of competency, the allottee could "sell and convey" the surplus lands, which would "become subject to taxation." *Id.* at 38a. "While the minerals underlying the former tribal lands were reserved to the Nation, all royalties [were to be] distributed to the individual members." *Id.* at 39a. "Although the Act contemplated a continuing tribal government, it left few powers to exercise." *Id.* at 40a. And the Enabling Act "earlier in the same month had subjected the Osage lands to Oklahoma law and Oklahoma courts." *Id.* Consequently, the Division Act "and surrounding circumstances establish Congress' plain intent to terminate the Nation's reservation."[6] *Id.* at 37a.

The Court of Appeals affirmed. Pet. App. 3a-23a. Unlike the district court, which found an unambiguous intent to disestablish, and, contrary to Petitioner's claim that the Court of Appeals found the Act "silent and unambiguous," Pet. 8, the Court of Appeals plainly found the Act ambiguous, Pet. App. 14a. Consequently, the Court of Appeals reviewed uncontroverted evidence of "circumstances surrounding passage of the Act," *id.*, concluding that "legislative history and the negotiation process make clear that all the parties at the table understood the

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[6] The district court concluded the Nation's long delay in asserting its reservation status claim and the State's and nonmembers' substantial reliance on the understanding that the County was not a reservation established that the equitable defense recognized in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005), barred the Osage claim. Pet. App. 56a. The Tenth Circuit, having affirmed on disestablishment grounds, declined to reach the equitable ruling. Pet. App. 23a.

Osage reservation would be disestablished." *Id.* at 17a. It also reviewed the uncontroverted record of events occurring immediately after 1906 and found that "federal officials responsible for the Osage lands repeatedly referred to the area as a 'former reservation' under state jurisdiction," *id.* at 20a, that "uncontested population demographics demonstrate a dramatic shift . . . immediately following the passage of the [Act]," *id.* at 21a, and that "[l]and ownership also dramatically shifted from tribal members to nonmembers through certificates of competency." *Id.* at 22a. Rejecting Petitioner's reliance on recent federal actions, *id.* at 19a, the Court of Appeals held "the Osage reservation has been disestablished by Congress." *Id.* at 22a.

REASONS FOR DENYING THE WRIT

Petitioner, facing Commissioners' uncontroverted record on every element under this Court's precedents, advocates an unsupportably narrow view of this Court's disestablishment jurisprudence. Complaining that "[n]one of the statements [in the Act] even mentions disestablishment," Pet. 19, Petitioner contends that this Court has imposed "clear statement requirements that cannot be satisfied by extra-textual, second- and third- hand material." *Id.* at 13. But the Court has expressly rejected such a "plain statement" rule, *Hagen v. Utah*, 510 U.S. 399, 411-12 (1994), and has implicitly rejected any such requirement in recent and directly relevant guidance, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998): "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from

the surrounding circumstances may support the conclusion that a reservation has been diminished."

Mischaracterizing the decisions below, Petitioner disregards substantial textual expressions of intent to terminate the Reservation plainly reflected in the Act's express terms, legislative history, and the contemporaneous Enabling Act. Disregarding its own proposed interpretive rule, Petitioner relies on inherently ambiguous or merely geographic references in the Act and modern administrative and Congressional materials, and invokes current "Executive Branch" views, evidence that this Court and others have found to be unreliable indicators of the intent of an allotment era Congress. *Yankton Sioux*, 522 U.S. at 355 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 162 (2nd Cir. 2003) ("*Oneida*"), *rev'd on other grounds, City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

The cases Petitioner cites from other Circuits apply the same precedents of this Court to materially different statutes and significantly different records; they reflect different outcomes, not different rules of law. On the undisputed record below, the Opinion is an unexceptional application of existing law. It does not conflict with the decisions of this Court or any other Circuit and does not present a substantial federal question.

I. THE OPINION BELOW CORRECTLY APPLIES THIS COURT'S PRECEDENT TO A UNIQUE AND COMPELLING RECORD.

The Petition recognizes only portions of this Court's three-part "fairly clean analytical structure" for analyzing disestablishment cases. *See Solem*, 465 U.S. at 470. The decisions below, however, adhered faithfully to the analysis *Solem* and this Court's other precedents prescribe, looking to the language of the Division Act, the contemporaneous understanding of the impact of the Act, including the negotiations leading to enactment and its legislative history, events immediately following the Act's passage, including subsequent treatment and jurisdictional understandings regarding the area. *Id.* at 470-71.

First, "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Id.* *Solem* cautions that courts cannot expect Congress to have used specific language "detail[ing] whether opened lands retained reservation status or were divested of all Indian interests." *Id.* at 468 ("Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."). Thus, "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Id.* at 471.

Second, *Solem* recognizes,

> When events surrounding passage of the [dispositive] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of

> the legislative Reports presented to Congress—unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Id. Third, *Solem* also sanctions looking, "to a lesser extent," to "events that occurred after the passage of [the dispositive] Act to decipher Congress' intentions." *Id.* at 470-71. And, *Solem* "recognized that who actually moved into opened reservation lands is also relevant to deciding whether a [dispositive] Act diminished a reservation." *Id.* at 471.

The Petition advances an analysis that cannot be harmonized with *Solem*. This Court has rejected Petitioner's contentions that the Court requires specific language of disestablishment or termination and that it imposes a "plain statement" rule. In *Hagen*, the Court reiterated that it has "never required any particular form of words before finding diminishment." 510 U.S. at 411; *see also Yankton Sioux*, 522 U.S. at 344-45 (collecting authorities and recognizing the Supreme Court has "construe[d]" language that "indicates diminishment" from Acts that do not explicitly terminate, abolish, or disestablish). Consequently, "evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux*, 522 U.S. at 351. In case after case,

this Court construed differing statutory language and unique historical records to divine congressional intent, recognizing that a disestablishment analysis is necessarily fact-specific. *Solem*, 465 U.S. at 469 (the effect of an "Act depends on [its] language and the circumstances underlying its passage").

As the courts below determined, the Division Act's compelling indications of Congress' intent to disestablish and the substantial and uncontroverted record regarding each factor of the *Solem* test point unequivocally to the disestablishment of the Osage Reservation. This case does not call for the Court to revisit its repeatedly articulated guidance.

A. The Text of the Division Act Demonstrates Congressional Intent to Disestablish the Osage Reservation.

Petitioner ignores the district court's extensive statutory analysis and mischaracterizes the Court of Appeals' opinion as concluding the Act is "silent and unambiguous" as to continued reservation status. Pet. 8. Petitioner is wrong on this crucial point. Although the district court found the Act, correctly in the Commissioners' view, unambiguously intended disestablishment, Pet. App. 37a-42a, the Court of Appeals concluded "the operative language of the statute does not unambiguously suggest diminishment or disestablishment" and proceeded to address the standards applicable "if the statute is ambiguous." Pet. App 14a-22a. The Court of Appeals did not find "no ambiguity in statutory text." Pet. 10. The Act either unambiguously intends disestablishment or is, at a minimum, ambiguous on that intent, because the express terms of the Act convey substantial congressional intent to disestablish the Reservation.

The Petition is similarly mistaken in portraying the Division Act as merely a run-of-the-mill allotment act that did no more than issue allotments to tribal members. Pet. 17, 19. The statutory text reflects a far broader intent. At Osage members' request, the Act effected a remarkable and then-unprecedented divestiture of the Osage Tribe's[7] beneficial interest in nearly all tribal lands, accrued tribal funds, and future revenues, and transferred the beneficial interest in substantially all these assets to the individual members. Section Two of the Act (Pet. App. 59a-66a): (1) provided for the sale of buildings used by tribal government, including "the Chief's house"[8]; (2) transferred essentially all remaining lands of the Osage Tribe to 2,229 identified tribal members subject to terms contemplating that members would promptly sell the great majority of those lands to non-Indians; and (3) reserved the entire interest in the former tribal mineral estate, not as the Petition states, "for the benefit of the Osage Nation," Pet. 3, but for the exclusive benefit of only the 2,229 individual "headright" members, leaving the Tribe only a small allowance to manage the minerals. The Tribe was

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[7] The name "Osage Nation" was adopted in 1994 and refers to the current Plaintiff tribe; "Osage Tribe" refers to the historic Osage Tribe, the subject of the Osage Division Act.

[8] True to its name, the Act divided all former tribal lands among the members of the Tribe. Division Act, § 2 (Pet. App. 59a-66a). Out of nearly 1.5 million acres, the Act only reserved for the Tribe three tracts totaling 480 acres, "exclusively, for dwelling purposes," and boarding school, reservoir, and agent's residence areas totaling slightly over 110 acres, all subject to sale by the Tribe. *Id.* Ninth, Tenth (Pet. App. 63a-64a).

left with no other financial assets or revenue sources necessary to support a tribal government.[9]

Contrary to the Petition's assertions, these provisions do not reflect statutory "silence" as to disestablishment. Pet. 18. In historical context, the Act and the history of its negotiations demonstrate Congress' and the Tribe's intent to terminate reservation affairs. The Act's allocation of sale proceeds to individuals contrasts starkly with the March 22, 1906 Act this Court interpreted in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In *Seymour*, the Court found support for continued reservation status in the relevant act's provisions for funds from sale of lands to be deposited in the United States Treasury "to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington." *Id.* at 355. Similarly, *Solem* reflects that the dispositive act's retaining revenues for the tribe supported Congress intended to retain reservation status. 465 U.S. at 473-74 (because proceeds of sale were to be retained for the Cheyenne River Tribe's credit, the Secretary was "simply being authorized to act as the Tribe's sales agent"). Here, the Division Act's transferring all such assets from the Tribe to individual headright owners reflects the understanding that the Tribe would not need those

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[9] The Act transferred from the Tribe to its headright owning members (1) all funds from the Tribe's sale of its Kansas lands; (2) all mineral royalties; (3) all funds from the sale of town lots and other properties; and (4) "all monies to be received from the sale of grazing lands." Act, § 4, First, Second (Pet. App. 67a-68a). *See McCurdy v. United States*, 246 U.S. 263, 265 (1918).

assets because the State and County would govern the former reservation.

Contrary to Petitioner's contention that the Act did not open the Reservation to non-Indians and "allotted the surface estate in trust exclusively for Osage members," Pet. 3, the Division Act provided for the immediate sale of some tribal lands and, by imposing taxation and authorizing sale of "surplus lands" upon issuance of a certificate of competency, set the stage for the inexorable sale of former reservation lands to non-Indians. Although providing for issuance to each member of one "homestead" allotment to remain restricted for twenty-five years, it gave each allottee three "surplus lands" allotments, representing over two-thirds of the former Reservation, which the allottee could dispose of "the same as any citizen of the United States" upon demonstrating competency. Division Act, § 2, Seventh (Pet. App. 62a). Reinforcing the intent that most tribal lands allotted would be alienated promptly to nonmembers, all "surplus lands" allotments were to be taxable upon the earlier of three years after passage of the Act or issuance of a certificate of competency.[10]

The contemplated taxation and sale of allotted surplus lands must be viewed through the then-contemporary understanding that sale would divest the lands of reservation and "Indian country" status. *Yankton Sioux*, 522 U.S. at 343 ("The notion that reservation status of Indian lands might not be

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[10] At Osage, the Act of April 18, 1912, ch. 83, 37 Stat. 86, expedited this process by providing that an Osage allottee's share of tribal accrued and annual revenues would be payable upon issuance of a certificate of competency. *See McCurdy*, 246 U.S. at 266.

coextensive with tribal ownership was unfamiliar at the turn of the century.").

The intent to disestablish is further reflected in the severe and historically unique limitations the Act imposed on Osage tribal government that focused on protecting property rights of headright owners. The Act prohibited the Osage from changing their membership or form of government without congressional consent and limited tribal membership and participation in tribal government to only those headright owners.[11] Division Act, § 9 (Pet. App. 70a). The Act prescribed a government, consistent with the statutorily limited revenue available to it, which functioned for nearly a century primarily to manage oil and gas proceeds and other assets for the headright-owning members. *See Osage Nation of Indians Judgment Funds: Hearings on S. 1456 and S. 3234, Before the S. Subcomm. on Indian Affairs*, 92nd. Cong. 14-15 (1972) (Report of Department of the Interior) ("1972 Senate Hearings Report") at 14-15 (Osage Tribal Council "primarily responsible for the management of the tribal mineral estate and other tribal assets" and "does not enact ordinances governing the conduct of [Osage] members").[12] These

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[11] Headright ownership, and hence tribal "membership," was a property right under the Act and original constitution. By 1972, over a third of headright owners, the only tribal "members" entitled to vote in tribal elections and share in tribal revenues, were, in fact, non-Indians or members of other tribes. 1972 Senate Hearings Report at 14-15; *Cohen's Handbook of Federal Indian Law* 313 (Nell Jessup Newton *et al.* eds., 2005) ("Most persons of Osage ancestry own no headrights.").

[12] This perception was revised when the Tenth Circuit later rejected certain members' contention that Osage government was limited to administering minerals. *See Logan v. Andrus*, 640 F.2d 269, 271 (1981). Not until 2006, after Congress

provisions are consistent with the record below: there was no evidence the Osage Tribe considered, prior to the period immediately preceding the filing of this suit, it retained a reservation.[13]

Against these remarkably restrictive statutory limitations, Petitioner relies on scattered references in the Act to the Osage "Reservation." Pet. 16. However, the reference to "reservation" in a statute may denote the tribe's former lands or status or may merely provide a "convenient geographical description." *Yankton Sioux*, 522 U.S. at 356. The Court of Appeals correctly concluded that any reference to the "reservation" is "indirect at best, and it does not [reflect an intent] to maintain exclusive tribal governance within the original reservation boundaries." *See Yankton Sioux*, 522 U.S. at 348.

The courts below correctly concluded that the manner in which the Act effected the "division" of all Osage lands and assets reflects an overarching intent to strip the Tribe of governmental assets, contemplated a severely limited tribal role inconsistent with governing a reservation, and, together with the contemporaneous Enabling Act, shifted governmental functions from the Osage Tribe to Osage County, Oklahoma. These textual indicia are consistent with, and compellingly support, a congressional intent to disestablish.

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recognized the Osage Nation could extend membership beyond headright owners, Pub. L. 108-431, 118 Stat. 2609 (2004), did the Nation adopt its present Constitution and seek to assert sovereignty over fee lands.

[13] Former Principal Chief Charles Tillman testified that, before filing this suit, the Osage Nation had never formally contended Osage County remained a reservation. *See* C.A. Supp. Add. 359-60.

B. The Enabling Act Reinforces the Intent to Disestablish.

Petitioner, though recognizing that the Enabling Act recast the Reservation as Osage County, Pet. 2, ignores the significance of the contemporaneous Enabling Act to the determination of intent. The required "examin[ation of] all the circumstances surrounding the opening of a reservation," *Hagen*, 510 U.S. at 412, requires consideration of the Enabling Act, passed two weeks before the Division Act. The Enabling Act set the stage for dismantling barriers between tribal members and state government that persisted in other states, reclassifying the Osage Reservation as Osage County and giving Osage members the right to vote on whether to establish State government. *See United States v. Bd. of Cnty. Comm'rs*, 193 F. 485, 491 (W.D. Okla. 1911), *aff'd*, 216 F. 883 (8th Cir. 1914), *app. dismissed*, 244 U.S. 663 (1917) (finding that the Enabling Act required the Oklahoma constitutional convention "to constitute the Osage reservation a single county . . . . These Indians were to obtain the advantages of state and local government which would redound to their welfare and advancement.").

At the request of the Osage, *see* C.A. Supp. App. 279, 303-04, the Enabling Act provided that the former reservation would become Osage County, Oklahoma, and supplanted, as to civil and criminal matters alike, tribal government with State and County government. Enabling Act, §§ 2, 21. The Osage request that they be placed in a single county following statehood reflected their recognition that State, not tribal, government would apply prospectively. Consistent with this request, the

Enabling Act replaced the formerly Indian character of government over the area with one emanating from state law, with a county seat, voting districts for state elections, and judges designated under non-tribal law. *Id.* As in *Yankton Sioux*, 522 U.S. at 352, the Osage would "assist in making the laws which will govern [tribal members] as citizens of the state and nation."

Dramatic differences between the Oklahoma-related provisions of the Enabling Act and those pertaining to New Mexico and Arizona in the same statute reinforce the Tenth Circuit's holding that the Division Act contemplated no Osage reservation would remain.[14] Unlike the Arizona and New Mexico provisions of the Enabling Act, the Oklahoma provisions made no distinction between tribal and non-tribal residents of the State, because in Oklahoma they were both to be taxable. *Compare* 34 Stat. 267, § 25, *with id.* § 3. While, in identical provisions of the 1906 Enabling Act, the three States disclaimed *title* to federal and Indian lands, the Arizona and New Mexico provisions, but not the Oklahoma provisions, contained a broad exception disclaiming *jurisdiction*, encompassing both federal public lands *and Indian lands*. *Compare id.* § 25, Second, (Arizona/New Mexico), *with id.* § 3, Third (Oklahoma) (only federal public lands). Similarly, the Enabling Act gave Oklahoma Indians the right to vote for or against statehood, and thus to influence whether they would assume rights and responsibilities similar to those of state citizens,

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[14] The New Mexico and Arizona portions of the Act, though enacted in the 1906 Act, did not become effective due to Arizona's rejection of joint statehood in 1906.

including taxation. *Id.* § 2; *see also Yankton Sioux*, 522 U.S. at 352.

The Osage Tribe's agreement that the Reservation would become Osage County in the new State and the Enabling Act's provisions subjecting Oklahoma Indians to Oklahoma law, *see* C.A. Supp. App. 306 & n.61, reinforce the textual indicia of intent in the Division Act. Whether historians and the district court are correct that "no reservations remain in Oklahoma," *see* Francis Paul Prucha, *The Great Father* 735-57 (1984) (cited Pet. App. 41a), is not presented in this case. However, the Enabling Act text reinforces the provisions of the Division Act reflecting that the 1906 Congress intended to terminate Osage reservation status. The statutes simply do not present the issue of "statutory silence" upon which Petitioner's arguments are premised.

C. The Circumstances Surrounding the Division Act's Passage Point to Disestablishment.

Petitioner disregards or distorts the Court of Appeals' detailed discussion of the historical background leading to the passage of the Act and the statements of Osage and congressional participants in the legislative process, as well as historians, recognizing that the Act would lead to "dissolution of the reserve." *See* Pet. App. 16a (quoting W. David Baird, *The Osage People* 68 (1972)). Rather than confronting the evidence below, Petitioner presents the Division Act in an historical and practical vacuum. As the Court of Appeals correctly concluded, however, based on uncontroverted evidence, "[t]he manner in which the [Act] was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished." Pet. App. 15a.

As the Tenth Circuit explained, the Division Act followed a history of increasing pressure on Indians in what is now Oklahoma for the relinquishment of tribal relations. *Id.* at 15a-18a. In 1894, pursuing its policy to encourage the abandonment of the reservations, the federal government sent a special Osage Commission to the Osage. C.A. App. 237. The record supports the Court of Appeals' finding that the Osage, although excepted from the Dawes Commission process, were acutely aware of the "familiar forces" affecting tribes in the allotment era, *see DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975), including non-Indians' pressure for tribal lands and passage of allotment era legislation, and that the Osage acted in response to those pressures. Pet. App. 15a. After the Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the "Osage would have clearly understood that they could no longer resist the imposition of allotment on their reservation [and their] efforts were thereafter devoted to obtaining the best terms that they could negotiate." C.A. Supp. App. 296; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88 (1977) ("By the time of the first of these Acts, in 1904, Congress was aware of the decision of this Court in [*Lone Wolf*], which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty.").

As the Court of Appeals recognized, prior to the passage of the Division Act, "'[for several years, the Osage . . . ha[d] been considering the question of asking the Government to divide its lands and moneys among the members of the tribe.'" Pet. App. 15a (alterations in original) (quoting S. Rep. No. 59-4210, at 1 (1906)). By June, 1904, the Osage elected a Chief who favored allotment, and the Tribe drafted

and approved legislation to that effect in a subsequent general election. C.A. App. 238. In 1905, Congress passed the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, creating the Osage Townsite Commission and opening lands to non-Indian settlement by authorizing the sale of townsites within the Reservation. C.A. Supp. Add. 011.

In 1905, an Osage delegation appeared before Congress to negotiate a bill "to abolish their tribal affairs and to get their lands and money fairly divided, among themselves, so that every individual will be there to give his views in the matter, and the majority agree upon a plan." C.A. Add. 009. Members of the Tribe were "very anxious to bring about the allotment at the earliest possible time," but sought to have the lands "held together until such time as the allotment can be made and then leave the new State of Oklahoma to do what in its wisdom seems fit in respect of the division of this territory into different counties." C.A. Supp. Add. 51. As the Court of Appeals found, Osage representatives recognized "that the allotment process would terminate reservation status." Pet. App. 16a (citing Black Dog).

The record supports the Court of Appeals' finding that "[t]he Osage themselves presented an allotment act to Congress in February 1906, and by June of that year, Congress passed the Osage Allotment Act." *Id.* at 16a. The legislative history reflects Congress' insistence on provisions to authorize certificates of competency and impose

taxation on surplus lands that would expedite the sale of surplus lands. *See id.* at 17a.[15]

Petitioner argues the insufficiency of each of these statements standing alone, but declines to address cumulatively the intent reflected in the course of negotiation and advances no countervailing evidence.[16] The record amply supports the Court of Appeals' conclusion that the "manner in which the [Division Act] transaction was negotiated," *Solem*, 465 U.S. at 471, reflects that "all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act." Pet. App. 17a.

D. Events Occurring After Passage of the Act Confirm Congress' Intent.

The Court has instructed that "events that occurred after the passage of a surplus land Act" are relevant to "decipher Congress' intentions." *Solem*, 465 U.S. at 471. Although the Court has called this factor "unorthodox and potentially unreliable," it also

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[15] *See* C.A. Supp. Add. 49 (1906 Letter of C.F. Larrabee, Acting Comm'r, Office of Indian Affairs) ("It is believed that the Osage Indians should be required to pay taxes on their surplus lands the same as citizens of Oklahoma Territory. There occurs to me no valid reason why the Indians should not be required to bear their share of the burden of State and county maintenance through taxation on their surplus lands.").

[16] Similarly, Justice Marshall's dissent in *Rosebud*, 430 U.S. at 626 (Marshall, J., dissenting), in which the majority held the Rosebud Sioux Reservation diminished, argued the "legislative history of the Rosebud Acts is extraordinarily sparse." However, the record here contains the statements of tribal representatives and members of Congress pointing towards disestablishment and "the record [of the negotiations] contains no discussion of the preservation of the [reservation] boundaries." *Yankton Sioux*, 522 U.S. at 347.

recognizes that, "in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue . . . the technique is a necessary expedient," *id.* at 472 n.13 (citation omitted), and that "[w]hen an area is predominately populated by non-Indians with only a few remaining pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Id.* at 471 n.12.

Factors indicating disestablishment include a dramatic decrease in tribal member settlement and an increase in non-Indian settlement immediately following the passage of the relevant Acts, *see Yankton Sioux*, 522 U.S. at 356, key participants' and officials' recognition that the reservation was terminated, *Solem*, 465 U.S. at 471, and settled jurisdictional expectations pertaining to the affected area. *Rosebud*, 430 U.S. at 604-05 ("[L]ongstanding assumption of jurisdiction by the State over an area that is over 90 % non-Indian both in population and in land use" weighs in favor of a finding of diminishment); *Yankton Sioux*, 522 U.S. at 357 ("The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding."). The record below contains compelling and uncontroverted evidence on each of these factors.

The Petition repeatedly mischaracterizes the Commissioners' demographic evidence as "modern." Pet. 5, 11. Nothing could be further from the truth. As the Court of Appeals recognized, Pet. App. 21a, the uncontroverted record established that, in just three years, from 1907 to 1910, the total Osage

County population grew by a third; then it grew by 82% from 1910 to 1920, and by another 30% from 1920 to 1930, roughly tripling the 1907 total population. C.A. App. 307-08. Significantly, by 1910, of the total County population of 20,101, only 1,345 persons identified themselves as Osage members and, by 1920, the total Indian population in Osage County was 1,208 out of a total of 36,536. *Id.* That demographic pattern continues. *Id.* at 309.

The uncontested facts further established that, pursuant to the Division Act and the subsequent Act of March 3, 1909, ch. 256, 35 Stat. 778, further authorizing the Secretary of the Interior to sell the "surplus lands" of the Osage, land ownership dramatically shifted from the Tribe and its members to non-members. As the Court of Appeals found, Pet. App. 22a, by 1957, the surface rights to 1.1 million of the 1,464,838.5 acres that were allotted under the 1906 Act had been alienated from trust or restricted status and, by 1972, only 231,070.59 acres held by 436 individuals, representing approximately one-sixth of the former Reservation area, remained in restricted ownership.[17]

The undisputed facts below also show that, in the period immediately following the 1906 Acts, Interior Department officials recognized repeatedly that the Reservation was disestablished and that jurisdiction had shifted as a result. As the Court of

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[17] Osage County land records now reflect only 109 acres held by the United States in trust for the Osage Nation and 518.14 acres of land described in those records as "Indian Village Lands" "set aside for the use and benefit of the Osage Indians." C.A. App. 291-92. These lands amount to roughly 0.04% of the total lands in Osage County. *Id.*

Appeals found, Pet. App. 20a-21a, the Osage Agency Superintendent acknowledged the jurisdiction of the State and County over Osage County, a recognition that was inconsistent with continued reservation status. In his 1916 annual report to the Secretary of the Interior, he states his "office has experienced no difficulty in maintaining order upon the reservation. This duty, of course, falls to the County and State officials." His 1919 Annual Report states that "Osage County is organized and the duties of maintaining order devolves on the County and State officials." The 1920 Annual Report refers to towns in "Osage County, formerly the Osage Indian Reservation." *See* Pet. App. 20a (citing record references). These reports by the official with immediate responsibility for the Osage stand uncontroverted in the summary judgment record regarding contemporaneous agency understandings; they are not merely casual references, as Petitioner suggests, to a "former reservation," but first-hand accounts that, following 1906, state and federal officials treated the area as a County, not as a reservation.[18] They unqualifiedly support the conclusions below that knowledgeable participants understood that the Reservation had been disestablished. They reflect that, immediately

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[18] The Petition takes liberties with the record on this point. The Superintendent is not a "regional" official, *see* Pet. 22, but the official directly supervising the delivery of federal services to a tribe. Petitioner's contention that references to a "former" reservation are by a "single" lower level BIA official misstates the record. *See* C.A. Supp. App. 316 n.70 (quoting April 21, 1908 Letter from the Acting Commissioner of Indian Affairs to the Indian Agent for Osage Agency concerning an "inquiry from one of the Township trustees of Osage County, formerly the Osage Indian Reservation, but now a part of the State of Oklahoma.").

following 1906, State and County jurisdictional authority displaced federal and tribal, patterns that continued to the time of the district court's opinion. C.A. App. 339-42 (Wayman Depo.); *id.* at 344-50 (Wilson Depo.); *id.* at 334-36 (Koch Depo.); *id.* at 360-61 (Tillman Depo.).

Congress also enacted legislation premised on the understanding the Reservation had been disestablished. Section 17 of the 1917 Indian Appropriations Act, ch. 146, 39 Stat. 969, 983, provided, "[a]ll of Osage County, Oklahoma, shall hereafter be deemed to be Indian country within the meaning of the Acts of Congress making it unlawful to introduce intoxicating liquors into Indian country." C.A. Supp. Add. 72. As this Court recognized regarding similar provisions of the 1910 Act subjecting the opened lands at issue in *Rosebud* to federal laws prohibiting the introduction of alcohol, *see Rosebud*, 430 U.S. at 613, the 1917 Act plainly reflects the understanding that, but for the new statute, Osage County was not Indian country and would only have that status pertaining to alcohol "hereafter." Long before 1917, Congress had already imposed federal prohibitions on introduction of alcohol into "Indian country." *Id.* Since the Court assumes "Congress is aware of existing law when it passes legislation," *Yankton Sioux*, 522 U.S. at 351, passage of the 1917 Act can only have been premised on the understanding that the Osage Reservation had been disestablished.

Compellingly, when Congress in 1936 enacted the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 503-509, allowing Oklahoma tribes to incorporate under the sovereignty-protecting provisions of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-

478, it expressly excluded Osage, leaving it perhaps the only Native American tribe then statutorily precluded from electing IRA powers. *See* 25 U.S.C. § 508.

Given that Petitioner advanced no evidence that contemporaries of the 1906 Act considered the reservation to remain intact, the Court of Appeals correctly considered this evidence probative.

E. Opinions of Historians Support the Tenth Circuit's Conclusion.

Petitioner criticizes consideration of the opinions of leading historians that its own expert testified were authoritative and accurate. Pet. 20-21. Contrary to Petitioner's unsupported disparagement, the evidence of historians' views the Commissioners presented below was not "post hoc academic conjecture." Pet. 20. It was introduced pursuant to expert testimony that was affirmed by a sound district court order that Petitioner did not challenge on appeal. C.A. Supp. App. 1-65.

The Tenth Circuit correctly considered the undisputed historical evidence submitted by Professor Kelly, Pet. App. 17a-18a, who this Court has cited. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 181 n.12 (1989). Professor Kelly collected and reviewed historical evidence from the National Archives and other sources contemporaneous to the 1906 Act, C.A. App. 241, 242-43, and related the consensus of historians who have studied the Osage, the Division Act, and its effects. *Id.* at 244. He identified as authoritative preeminent historian Francis Paul Prucha, whom this Court has cited repeatedly as authoritative, *see, e.g., Hagen*, 510 U.S. at 426 n.5, and other leading

historians on federal Indian policy, Oklahoma, and the Osage. The courts below did not err in considering the uncontroverted views of those authorities that the Osage reservation was "dissolved."[19] *See* Pet. App. 17a-18a (citing Kelly Aff. referencing authoritative works of Terry P. Wilson, *The Underground Reservation: Osage Oil* (1985); Berlin B. Chapman, *"Dissolution of the Osage Reservation," Chronicles of Oklahoma* (1942); Baird, *supra*, and Prucha, *supra*). Professor Kelly testified that their research and conclusions support his conclusion that, following 1906, the Osage Reservation "was dissolved and replaced by Osage County." C.A. Supp. App. 42.

Significantly, Petitioner's only arguably historical witness, ethno-anthropologist Garrick Bailey, Ph.D., testified that Professor Kelly is a "very good historian," C.A. Supp. App. 329, that Kelly accurately "reported what the historical record" said, *id.* at 331, and that Bailey had not formed a contrary opinion on whether "Osage County today is or is not a reservation," *id.* at 332. The Court of Appeals did not err in finding this evidence probative.

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[19] Far from disallowing historians' opinions, this Court itself has considered historians' reports in disestablishment cases. *See Solem*, 465 U.S. at 466 n.5 (report of F. Hoxie on Cheyenne River Act of May 29, 1908 "incorporated into the record"), & nn.21, 23, 24 & 25 (referencing Hoxie); *Yankton Sioux*, 522 U.S. at 346 (citing testimony of tribe's historian). The Circuits the Petition portrays, Pet. 8-11, as in conflict with the Tenth Circuit's Opinion have done so as well. *See, e.g., Oneida Indian Nation v. New York*, 860 F.2d 1145, 1149 (2d Cir. 1988); *United States v. Webb*, 219 F.3d 1127, 1137 (9th Cir. 2000).

F. Petitioner's Evidence of Recent and Ambiguous References to an "Osage Reservation" Is Not Probative.

Having submitted no evidence below regarding the period soon following 1906, Petitioner now advances isolated, unsupported federal statements that are more "contemporaneous" with the current litigation than with the dispositive 1906 enactments at issue. Pet. 23-26. The courts below correctly concluded this evidence did not contravene the evidence of the 1906 intentions of Congress. Pet. App. 18a-19a. Petitioner's evidence is entitled to little or no weight under *Solem*'s criterion, "events that occurred after passage" of the dispositive act. 465 U.S. at 471.

The Petition cites no authority supporting the assertions in its Questions Presented that the Second, Eighth and Ninth Circuits have ruled that recent "expert views of the Executive Branch," with other material, may "override" other evidence, or for the novel proposition that the courts below erred in not "obtaining" the views of the Executive Branch. Pet. Question Presented I & II. The cases the Petition cites, in fact, directly contradict these positions. The lead-off case Petitioner advances to portray a split in the Circuits, *Oneida*, 337 F.3d 139, 162, agrees with the Tenth Circuit on this point, as on others, *see* Point II *infra*, rejecting as unprobative of dispositive intent legislative and administrative documents issued at the earliest a half-century after the relevant events. The recent statements of contemporary regulators using the words "Osage Reservation" in the contexts Petitioner advances should be viewed as convenient geographical references, unfounded and uninformed speculation,

or the fruits of contemporary tribal efforts to expand jurisdiction previously abandoned or bypass gaming law requirements.

References to a "reservation" and maps showing an Osage "reservation," Pet. 25, are ambiguous at best given the specific reservation of the minerals underlying the County for the benefit of tribal members. *See* Wilson, *supra*. However, if a reference to "reservation" indicates the reserved minerals, a mineral "reservation" would not be material here. *See* C.A. 175 ("This reservation of mineral rights led to the BLM including an Osage Reservation on a map of the United States."). As the district court observed, Pet. App. 35a (quoting *Cohen's Handbook of Federal Indian Law* 34 (1982 ed.), a "reservation" must be "lands set aside under federal protection for the residence of tribal Indians."

Nor is it probative that the Acting General Counsel of the National Indian Gaming Commission opined, based on "limited documentation" Petitioner provided, that certain Osage lands lie within a "reservation" or that the agency authorized gaming based on the opinion. Pet. 23 (citing July 28, 2005 Letter, Penny J. Coleman National Indian Gaming Commission, to Richard Meyers, Department of Interior). The opinion does not apply this Court's disestablishment test; rather, it merely catalogues materials Petitioner submitted and concludes that "gaming on the two parcels is authorized." *Id.*

Other cited references do not support continued reservation status. The 1935 Opinion of the Solicitor, Pet. 28, concerned "crimes and misdemeanors" committed by or against Indians within the "Indian villages," the 480 acres of land retained by the Tribe in the Division Act, not the fee

lands at issue here. However, the Opinion expressed "no objection . . . to the continued exercise of State jurisdiction in accordance with the practice of some years' standing." The 1994 letter of a Regional Solicitor, Pet. 23, contains no analysis beyond stating the Reservation was created in 1872. C.A. 194-95. The 2006 Stipulation of Fact in litigation Osage filed against the United States, Pet. 26, did not concern reservation status; it concerned royalty accounting on Osage minerals, of course, separately "reserved." The Petition grossly mischaracterizes, Pet. 24, the effect of the Assistant Secretary–Indian Affairs' January 19, 2005 publication of a notice in the Federal Register, "Osage Tribe Liquor Control Ordinance." The publication was purely a ministerial act certifying the Nation's adoption of such an ordinance as required by 18 U.S.C. § 1161 and reflects no federal determination concerning the Osage Nation's reservation status. *See* 70 Fed. Reg. 3054 (Jan. 19, 2005).

None of these documents, tendered without evidentiary foundation, contain probative content concerning the intent of the 1906 Congress which might override views of officials contemporaneous to the Division Act and the Enabling Act.

The only authority the Petition cites for the novel proposition that a court must consider, much less "obtain," the current position of the United States references a position far from current to the disestablishment litigation, Pet. 22 (citing *Hagen*, 510 U.S. at 417-18). *Hagen* did not rely on current executive views, but instead referenced 1903 and 1905 executive actions contemporaneous with the dispositive act. *Id.* at 417-20. But here, the Commissioners' uncontroverted evidence showed the

Executive Branch during the period soon following 1906 unequivocally considered the reservation terminated. Given that evidence, this Court should reject the Petition's invitation to create a disestablishment jurisprudence that would give weight to fruits of recent legislative and administrative efforts by any side. The Petition's list of recent "reservation" references carries little if any weight.

The courts below correctly relied on the language of the Division Act, negotiating and legislative histories, and evidence contemporaneous to and immediately following the 1906 Act, all supporting the widespread understanding that Congress intended the Act to disestablish the Osage Reservation. That conclusion presents no issue warranting this Court's discretionary review.

II. THE OPINION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner fails to demonstrate the existence of a split in the Circuits. Rather, under *Solem*'s "fairly clean analytical structure," different statutory texts, surrounding circumstances, and subsequent histories led to the different results in the one-case-per-Circuit examples the Petition deploys.[20] *See Solem*, 465 U.S.

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[20] Petitioner bases its argument that a conflict within the circuits exists on the faulty premise that an analysis of the "same statutory text" by one court must lead to an identical outcome in another court. Pet. 12 ("The law in the area now varies so substantially by geography that analysis of the same statutory text would produce polar opposite outcomes depending on the circuit in which the case arises or the land happens to lie."). This argument is legally and factually unsupportable. *See Minnesota v. Mille Lacs Band of Chippewa*

at 467 ("Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise.").

The Second Circuit in *Oneida*, 337 F.3d 139 (2nd Cir. 2003), did not adopt the narrow approach Petitioner urges. The *Oneida* court recognized that language of cession "is not a prerequisite for a finding of diminishment. Rather an act's legislative history and the subsequent treatment of the land (including settlement patterns), may also suffice." *Id.* at 159. The Second Circuit clarified that "when these elements, considered in their totality, fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did take place." *Id.* at 160.

The *Oneida* court rejected the argument that legislative and administrative documents and subsequent treatment of the reservation demonstrated that the reservation had been disestablished, not because they were legally immaterial but because they were factually insufficient because remote in time from the dispositive actions. *Id.* at 162-64. There is no material distinction between the legal standards the Second Circuit applied in *Oneida* and those the Tenth Circuit applied here.

Indians, 526 U.S. 172, 202 (1999) ("The . . . argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction.").

Similarly, in *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), the Ninth Circuit did not mechanically conclude that the absence of explicit language disestablishing the reservation rendered any further analysis unnecessary. Instead, after recognizing that the language of the General Allotment Act did not evidence Congress' intent to disestablish the Nez Perce Reservation, the court found the text of the relevant act, including a savings clause added at the Nez Perce's insistence, and the circumstances leading to and following passage of the dispositive 1893 Agreement, reflected that federal officials, the Nez Perce, Congress, and State officials all considered the Reservation to remain. *Id.* at 1135-37. *Webb* did not reject evidence of contemporaneous understanding because it was legally immaterial. *Id.* at 1137 n.15. Nor did the court refuse to consider historical testimony. Rather, "[t]he historical information independently confirm[ed] that there was no intent to diminish or disestablish the Nez Perce Reservation." *Id.* at 1138. The decision below does not conflict with *Webb*.

The Eighth Circuit's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th 2010) ("*Podhradsky*"), does not even address the issue Petitioner posits, much less reflect a circuit division. The cited pages of the Eighth Circuit's decision, 606 F.3d at 1008-10, address disestablishment in light of this Court's *Yankton Sioux* decision and the Eighth Circuit's earlier decision in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999) ("*Gaffey II*"). There is no indication in *Podhradsky*, or the district court decision it reviewed, *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1045-46, 1052-53 (D.S.D. 2007), that either court declined to consider or discounted the significance of the kinds of

evidence the Petition disparages here—or that any party advanced such evidence. However, the Eighth Circuit looked beyond the statutory text and placed weight, on the "historical record" of negotiations, just as the Court of Appeals did below. Pet. App.14a-18a.[21]

That the Tenth and Eighth Circuits are in concert is plainer still when *Podhradsky* is viewed against its predecessor decisions, *Yankton Sioux*, in which this Court extensively considered the 1894 Act, its language, legislative history, contemporaneous events surrounding passage, and subsequent treatment of the area, and *Gaffey II*. In *Gaffey II*, the Eighth Circuit recognized that "[e]ach act must be analyzed individually, its effect depending on the language used and the circumstances of its passage." *Gaffey II*, 188 F.3d at 1022. *Gaffey II* expressly accords subsequent events weight consistent with the decision below: "Although evidence regarding the subsequent treatment of the area cannot control when there is strong textual and contemporaneous evidence regarding the status of the land in question, courts have consistently recognized that events occurring after the passage of [an act] may shed light on the contemporaneous understanding of the act"; and, "[e]stablished jurisdictional patterns may also over time lead to the development of justifiable expectations which the Supreme Court has found worthy of consideration."

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[21] Petitioner's reliance on *Yellowbear v. Wyoming*, 174 P.3d 1270 (Wyo. 2008), as further evidence of a conflict is misplaced. Indeed, in that case, after finding hallmark language of disestablishment, *id.* at 1282, the court nevertheless looked to circumstances surrounding passage of the act and subsequent treatment of the area. *Id.* at 1282-84.

Id. at 1028. *Gaffey II* agreed also with the decision below in finding "limited interpretation value" in evidence of "Yankton Sioux Reservation" in later administrative documents and maps. *Id.* at 1029 n.11. The Eighth Circuit's jurisprudence does not conflict with the decision below.[22]

Any differences between the decision below and the holdings of other Circuits are based on the differences in the records before the courts and do not warrant this Court's review.

III. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Petitioner and *Amicus* falsely portray the decision below as injecting uncertainty regarding civil or criminal jurisdiction.[23] This Court rightly rejected similar fears in *Rosebud*: "To the extent that [tribal] members . . . are living on [non-reservation] allotted land . . ., they, too, are on 'Indian country,' within the definition of 18 U.S.C. § 1151, and hence subject to federal provisions and protections." 430 U.S. at 615 n. 48.

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[22] Given that there is no conflict between the Opinion and the decisions of the Second, Eighth, and Ninth Circuits, the Seventh Circuit decision in *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009), is not material here. However, the Seventh Circuit analyzed both clear statutory text and compelling surrounding circumstances in its diminishment analysis. *See id.* at 665 (Ripple, J., concurring).

[23] The Petition also seeks to invoke this Court's discretionary review by referring to this Court's recent grant of *certiorari* in *Madison County v. Oneida Indian Nation*, No. 10-72, 79 USLW 3062 (U.S. Oct. 12, 2010). *See* Pet. 29. This Court, however, recently remanded the case to the Second Circuit Court of Appeals, No. 10-72, 562 U.S. ___, ___ S. Ct.___ (Jan. 10, 2011), and thus, *Madison* no longer "confirms the importance of the [disestablishment] question." Pet. 29.

Any jurisdictional confusion regarding whether a tribe, state or federal government has criminal and civil authority arises, not by the decision below, but because allotment-era Congresses enacted certain allotment-era acts that disestablished or diminished reservations and others that did not. *See Solem*, 465 U.S. at 468 ("[I]t is settled law that some surplus lands Acts diminished reservations, and other surplus lands Acts did not." (Citations omitted.)). Striving to discern congressional intent in each of its disestablishment and diminishment cases, this Court has crafted an analytical framework that pragmatically addresses *Amicus*' concerns by providing a fact-specific analysis to discern Congress' intent while honoring the context in which the allotment era Congresses acted and according weight to longstanding jurisdictional expectations. The Tenth Circuit's straightforward application of that standard does not create issues capable of recurrence.

The Tenth Circuit's finding of congressional intent to disestablish the Reservation reaffirms longstanding understandings and expectations that the State and County would exercise authority over the former reservation, understanding which are reflected in on-the-ground law enforcement today. *See Rosebud*, 430 U.S. at 603-04 ("Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of this authority is a factor entitled to weight as part of the 'jurisdictional history.'").

The Tenth Circuit's decision does not inject uncertainty into Indian country jurisdiction. Rather, the narrow analysis Petitioner and *Amicus* advocate, prohibiting consideration of longstanding jurisdictional history if the statutory text does not satisfy their proposed elevated interpretive standard, truly would threaten to destabilize civil and criminal jurisdiction. Their test would optimize the ability of a civil litigant, government, or criminal defendant, advancing a newly-minted statutory interpretation, to overturn longstanding jurisdictional expectations, even those shown by unequivocal evidence of contemporary understandings and subsequent demographic and jurisdictional history, like those presented here. Petitioner and *Amicus* disregard that, "[w]hen a party belatedly asserts a right to present and future sovereignty over territory, longstanding observances and settled expectations are prime considerations." *City of Sherrill*, 544 U.S. at 218 (footnote omitted). Upsetting such settled expectations, in fact, is precisely Petitioner's objective here. This is not the proper case in which to address *Amicus*' concern.

CONCLUSION

For the foregoing reasons, the Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

Rather than refute the need for this Court's review of the proper legal test for discerning clear congressional intent, which is the question actually presented by the petition, the Acting Solicitor General's brief reformulates the question presented almost beyond recognition, and then devotes itself to addressing why *its* question, which focuses heavily on tax immunity, does not warrant review. *Compare* Pet. i, *with* SG Br. i. That effort, however, just compounds the confusion in the law and the need for this Court's review.

First, the Acting Solicitor General's attempt to minimize the conflict in courts' legal standards rests upon an analytical framework that departs from the United States' own prior briefs to this Court and their discussions of the legal rules governing the disestablishment inquiry.[1] Given, moreover, that the United States does not dispute that explicit congressional direction is lacking in this case and given the Executive Branch's repeated recognition for a century of the Reservation's continued existence (including within entire portions of the Code of Federal Regulations, 25 C.F.R. Parts 177, 180, 204),

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[1] *See* U.S. Amicus Br. at 9, 23-24, 28-29, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1993) (No. 96-1581); U.S. Cert. Br. at 13-17, *Dauggard v. Yankton Sioux Tribe*, Nos. 10-929, *et al.* (analysis governed by statutory text, subsequent statutory enactments, and negotiating history, with only one confirmatory sentence referencing tribal activity).

the brief exacerbates the legal disarray by putting the federal government on both sides of the dispute over what factors, if any, predominate in "clear" congressional intent determinations.

Second, the Acting Solicitor General's opining about petitioner's tax immunity claim compounds the problem because withdrawal of such immunity requires its own clear statement of congressional intent, just like the disestablishment inquiry. Yet the government's brief cites no clear or unequivocal congressional direction regarding Osage income tax immunity either. Whether such clear statements must be anchored in statutory text and unequivocal legislative history, as the government has pressed in other cases and the Seventh, Eighth, and Ninth Circuits have held, or can rest dispositively on post hoc extra-legislative inferences is precisely the question presented. Layering on yet another "clear" statement inquiry just makes a bad mess in governing law worse.

Finally, the government's argument against review never come to grips with the profound political, economic, structural, societal, and practical repercussions of disestablishment questions both to Indian tribes and to State and local governments. By its very nature, a judicial decision that exercises disestablishment power vested in the Political Branches, without unequivocal direction from either Congress or the Executive Branch (*see* SG Br. 16), and wipes away an entire reservation that Congress expressly created and the tribe itself bought and paid for, 1 Indian Aff. L. & Treaties 137 n.a (Charles J.

Kappler ed., 1902), is the type of weighty decision that merits this Court's attention.

I. THE GOVERNING LEGAL STANDARDS ARE IN CONFLICT

The Acting Solicitor General avoids the conflict in governing standards by stating the question at too general a level. The conflict is not over whether lower courts dutifully recite this Court's "clear[]" and "explicit" congressional intent rule from *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). *See* SG Br. 9-12. The problem, as history shows, is that, when given a "clear" statement rule, courts can veer into differing and contradictory legal tests for discerning that requisite "clear" congressional direction. *See Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010) (courts developed differing tests to determine clear congressional intent to apply statute extraterritorially).

That is what has happened here. The Tenth Circuit held that an explicit and unequivocal statement of congressional intent that appears nowhere in statutory text or unequivocal legislative history could be discerned from post hoc academic writings, modern demographic statistics, and the tribe's mere awareness during enactment of the allotment process (SG Br. 8; Pet. App. 15a-16a). Under the Tenth Circuit's rule, those extra-governmental factors trump Congress's repeated and explicit statutory recognition of the Reservation's existence. *See* Osage Allotment Act, Pub. L. No. 59-321, 34 Stat. 539, §§ 4, 7, 10, 11 (1906); Oklahoma

Enabling Act, Pub. L. No. 59-234, 34 Stat. 267 (1906) (seven references to the Osage Reservation); Indian Appropriation Act of June 21, 1906, Pub. L. No. 59-258, 34 Stat. 325 (regulating trade on the "Osage Indian Reservation"); Act of Mar. 2, 1917, Pub. L. No. 64-369, 39 Stat. 969 (declaring all of Osage County, which is the Reservation, "Indian Country" for liquor law purposes); Act of May 25, 1918, Pub. L. No. 65-159, 40 Stat. 561 (regulating receipts from leases "upon the lands of the Osage Reservation").

The Seventh Circuit, in a decision that the Solicitor General (like respondents) ignores, has likewise predicated disestablishment on post-enactment non-legislative evidence and some legislative history, despite the absence of any textual anchor or unequivocal expression in legislative history. *See Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657, 665 (7th Cir. 2009). So too has the South Dakota Supreme Court afforded "persuasive bearing" to a post-legislative "change in regional character" in finding disestablishment despite "uncertain" textual support. *Bruguier v. Class*, 599 N.W.2d 364. 375 (S.D. 1999).

Other courts of appeals have held, however, that Congress's words, plain statutory text, and unequivocal legislative history carry predominant weight in discerning a "clear" and "explicit" congressional intent on such an acutely political question as disestablishment. In the Second, Eighth, and Ninth Circuits, unless the statute is itself textually equivocal and contradictory—not just silent—disestablishment cannot be grounded in the

same types of external, non-legislative or post hoc indicia that the Tenth Circuit here held were dispositive. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), cert. pending, Nos. 10-929, 10-931, 10-932, 10-1058; *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 158 n.6 (2d Cir. 2010), *cert. granted*, No. 10-72, *cert. dismissed* (Jan. 10, 2011); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000).

The Solicitor General says (SG Br. 13) that those differences in outcomes are simply the product of "different factual records before each court." But the same factual setting has produced flatly contradictory rulings concerning the *same reservation* precisely because of the conflicting legal rules for whether and how congressional intent is made "clear." *Compare Bruguier, supra* (Yankton Sioux reservation disestablished based on post hoc changes, despite the absence of unequivocal text or legislative history), *with Yankton Sioux, supra* (Yankton Sioux reservation not disestablished due to absence of clarity in statutory text and legislative history, as confirmed by Executive Branch practice).

Likewise here, the Tenth Circuit's legal standard found "clear" evidence of disestablishment even though (i) Congress has, in five separate statutes, expressly acknowledged the Reservation's continued existence; (ii) a broad cross-section of Executive Branch agencies have long recognized its existence, Pet. 22-25; and (iii) the Acting Solicitor General acknowledges that the evidence of disestablishment is "unclear" (SG Br. 16) and thus that this Court's

"clear" statement test has not been met. That sharp contradiction between the court and the Political Branches cannot be chalked up to misapplying law to facts (*see* SG Br. 14). Rather, the Tenth Circuit got the legal rule wrong at the outset, turning a mandate for genuinely "clear" and "explicit" *congressional* intent into a license for *judicial* conjecture unhinged from Political Branch direction.

Indeed, petitioner's point is the same as that advanced by the Solicitor General in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). There the United States was explicit that *Solem's* clear-statement requirement, as a matter of law, should give predominant weight to statutory text and that, when statutory text is silent or ambiguous, courts cannot ground Congress's "clear" statement in extra-congressional, extra-governmental, post hoc materials. "[E]vents surrounding the passage of a surplus land act * * * rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act itself is *silent or ambiguous*." U.S. Br. at 9, *Yankton Sioux*, *supra* (No. 96-1581) (emphasis added); *contrast* SG Br. 12. The occasional lapses or inconsistencies in Executive Branch treatment relied upon by the Acting Solicitor General in this case, *compare* SG Br. 18-19, *with* Pet. 5, 22-27 (citing extensive Executive Branch recognition of the Reservation), were declared by the Solicitor General to be "of no help" in documenting disestablishment unanchored in statutory text or unequivocal legislative and negotiating history in *Yankton Sioux*. U.S. Br. at 24, *Yankton Sioux*, *supra* (quoting *Solem*, 465 U.S. at 478). And again, the

Solicitor General said before that "isolated floor statements * * *" especially *when no such references appear in the text of the Act* itself, shed little light on the diminishment question." U.S Br. at 22, *Yankton Sioux*, *supra*; *contrast* SG Br. 12, and Pet. App. 16a.

Indeed, the central theme of the United States' *Yankton Sioux* brief is that certain factors in the clear-statement inquiry predominate and, more specifically, that other disestablishment indicia cannot trump "countervailing evidence from Congress and the Executive Branch," U.S. Br. at 28, *Yankton Sioux*, *supra*. That is precisely the question raised by the petition in this case. Whether right or wrong, petitioner's and the Solicitor General's (prior) view of the predominating factors under the clear-intent test, and the rules for disestablishment enforced by the Second, Eighth, and Ninth Circuits are *legally* irreconcilable with the entirely extra-congressional and extra-governmental analytical model of "clear" congressional intent enforced by the Tenth Circuit here (and the Seventh Circuit and South Dakota Supreme Court). If the Acting Solicitor General no longer believes that there should be consistent legal rules about how "clear" congressional intent is made clear and when "countervailing evidence from Congress and the Executive Branch" will predominate, *ibid.*, that change in position simply muddies the waters more. Given how frequently the question arises (*see* Pet. Reply Br. 1-2), and the importance of the disestablishment test to States, local jurisdictions, and tribes, this Court's review is needed.

II. THIS CASE SQUARELY PRESENTS THE QUESTIONS FOR REVIEW

Because of its stark disregard of repeated and express statutory recognition of the Reservation by Congress and Executive Branch regulations and other official statements, Pet. App. 19a, the Tenth Circuit's decision encapsulates the divide in governing legal standards for disestablishment and the predominance (or not) of evidence from the mouths of Congress and the Executive Branch. The Acting Solicitor General's contention (SG Br. 15) that this case is not the best vehicle for resolving that conflict cannot withstand scrutiny.

1. The Solicitor General first notes (SG Br. 15) that "Oklahoma tribes have an anomalous statutory and historical backdrop." That is quite beside the point. Whatever the statutory or historical tribal differences, this case is about the legal rules for establishing *Congress's* clear intent and those rules should be the same for the full spectrum of cases arising across the United States.

Indeed, the Acting Solicitor General's brief does not remotely suggest that the test for congressional intent should vary from State to State. Quite the opposite, the *Murphy* brief that the Acting Solicitor General cites (SG Br. 16) applied the same legal framework advocated by petitioner here (and advocated by the Solicitor General in *Yankton Sioux*). In *Murphy*, the Solicitor General argued that it was a series of "[s]tatutes enacted" by Congress, subsequent legislation expressly referencing disestablishment,

and the "settled" position of the Executive Branch that demonstrated congressional intent to disestablish another Oklahoma reservation. U.S. Br. at 17, 19, 20, *Murphy v. Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787). So the fact that this is an Oklahoma case is irrelevant because a single governing legal test for discerning clear congressional intent should still apply. And the test propounded by the Solicitor General in *Murphy* bears no resemblance to the legal test applied by the Tenth Circuit here, where statutory text, subsequent enactments, and longstanding Executive Branch regulations and official documents have repeatedly acknowledged the Reservation's continued existence.

2. The Acting Solicitor General also argues (SG Br. 16-22) that review is not warranted because petitioner's underlying tax immunity claim is mistaken. Whether Congress expressly consented to state taxation of individual tribal members' income, however, is a quite distinct question from whether the Reservation has been disestablished. Indeed, it is only if a Reservation exists in the first place that Congress would need to address and authorize such taxation.

In any event, the argument simply confuses matters more because a "clear" statement of congressional intent is also required for States to tax reservation Indians on income earned on the reservation. "States may tax Indians only when Congress has manifested clearly its consent to such taxation." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *see Oklahoma Tax Comm'n v. Sac and*

Fox Nation, 508 U.S. 114, 126 (1993) ("Congress [must] expressly authorize[] tax jurisdiction in Indian Country."); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973) ("Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.") (quoting U.S. Dep't of Interior, *Federal Indian Law* 845 (1958)).

The government's entire argument thus repeats, rather than avoids, the foundational question of how such express congressional intent can be discerned apart from express statutory text and unequivocal legislative history. With respect to the Osage, there is no textual, structural, or unequivocal legislative history directive that would overcome the background rule that States may not "tax a reservation Indian for income earned exclusively on the reservation." *McClanahan*, 411 U.S. at 168. Indeed, contrary to the Acting Solicitor General's argument (SG Br. 19-22), this Court's precedent has extended traditional tax immunity rules to Osage members. *See McCurdy v. United States*, 264 U.S. 484, 485-486 (1924) (Osage Indians immune from taxation of allotted lands held in trust by the United States, based on general rules of Indian tax immunity); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522, 523, 529-530 (1916) (tribal lease "in the Osage Reservation" not subject to state taxation), *overruled on other grounds, Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 366 (1949) (noting subsequent congressional authorization of lease tax); *cf. West v. Oklahoma Tax Comm'n*, 334

U.S. 717, 725-727 (1948) (applying general precedent to the Osage).

To be sure, this Court has held that Osage members who received certificates of competency are subject to taxation on headright income. *See Choteau v. Burnet*, 283 U.S. 691, 695 (1931); *Leahy v. State Treasurer of Okla.*, 297 U.S. 420 (1936). But that is because Congress expressly authorized such taxation. *See* Osage Allotment Act § 2 (Seventh) (Pet. App. 62a) ("[U]pon the issuance of such certificate of competency the lands of such members shall become subject to taxation."); *see also Choteau*, 283 U.S. at 695 ("petitioner has therefore been taxable upon his allotted lands" since receiving a certificate of competency). *Leahy*, in turn, adopted *Choteau*'s reasoning. 297 U.S. at 421.

That precedent proves the opposite of what the Acting Solicitor General argues. If Congress had already broadly withheld traditional tax immunity from the Osage, then there would have been no reason for Congress to have subjected Osage members to taxation of headright income in the Osage Allotment Act. Such a targeted carve out of tax immunity, in other words, proves that the background rule of immunity governs unless and until Congress acts.

This Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), underscores that conclusion. It is of course true that *County of Yakima* "concerned the *General* Allotment Act, not the *Osage*

Allotment Act." SG Br. 21. But the point is irrelevant. *County of Yakima* recognized that, when clear congressional intent is required, courts cannot extend *in personam* jurisdiction over the descendants of original allottees because doing so would exceed the "literal coverage" of the relevant statute, 502 U.S. at 262, and thus would contradict this Court's "consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear,'" *id.* at 258 (quoting *Blackfeet Tribe*, 471 U.S. at 765). The same principle applies here. Because the "literal coverage" of the Osage Allotment Act extends only to original allottees with certificates of competency, the Act does not contain an "unmistakably clear" congressional intent to permit taxation of allottees' descendants. *Ibid.*

The government's other cases (SG Br. 19-20) are equally inapposite because they involve estate or inheritance taxes. See *United States v. Mason*, 412 U.S. 391 (1973); *West*, *supra*; *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943). Those taxes are "wholly different" for purposes of Indian tax immunity from "a state income tax on the income of a reservation Indian which was earned within the reservation." *Mason*, 412 U.S.at 396 n.7; *see West*, 334 U.S. at 727 (estate or inheritance tax "rests upon a basis different from that underlying a property tax").

Third, and in any event, this Court has pending before it multiple other petitions also presenting the disestablishment question. *See Dauggard v. Yankton*

Sioux Tribe, No. 10-929; *Southern Mo. Recycling & Waste Mgmt. Dist. v. Yankton Sioux Tribe*, No. 10-931; *Hein v. Yankton Sioux Tribe*, No. 10-932. Because the Osage's petition and the Tenth Circuit's decision best frame the legal question of how courts decide when congressional intent is clear, the better course of action would be to grant this petition and to hold or consolidate those other petitions. Alternatively, if the Court grants review in those cases, this petition should be held, with further disposition guided by the Court's ruling in those cases.

CONCLUSION

For the foregoing reasons, and those stated in the petition and the reply brief of petitioner, the petition for a writ of certiorari should be granted. In the alternative, if this Court grants review in *Dauggard v. Yankton Sioux Tribe*, No. 10-929, *Southern Missouri Recycling & Waste Management District v. Yankton Sioux Tribe*, No. 10-931, or *Hein v. Yankton Sioux Tribe*, No. 10-932, this petition should be held pending the Court's disposition of those cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Petitioner's Supplemental Brief ("Supp. Br.") attempts to answer the United States' reasoned and well-grounded brief *amicus curiae* ("U.S. Br.") by repeating Petitioner's mis-characterizations of the decisions below, the record, and other circuits' decisions. The Tenth Circuit's sound application of this Court's well-developed disestablishment jurisprudence to the unique legislation and history affecting the Osage neither injects "confusion" into reservation status determinations (Supp. Br. 1) nor portends "profound political, economic, structural, societal, and practical repercussions." (Supp. Br. 2) Quite the contrary, as the United States demonstrates, it is the Osage Nation's long-delayed claim that would engender unsettling repercussions.

I. THE TENTH CIRCUIT'S ANALYSIS CONFLICTS NEITHER WITH THIS COURT'S PRECEDENTS, NOR DECISIONS OF OTHER CIRCUITS, NOR PRIOR POSITIONS OF THE UNITED STATES.

Repeating its unsupportable charges that the applicable statutes are "silent" (Supp. Br. 6), and that the Tenth Circuit employed an "entirely extra-congressional and extra-governmental analysis (Supp. Br. 7), Petitioner persists in ignoring the

provisions of the Osage Division Act, (U.S. Br. 2-4; Respondents' Brief in Opposition ("Opp. Br.") 8-13), and the contemporaneous Osage Enabling Act, (U.S. Br. 2-3, Opp. Br. 14-16), that reflect clear Congressional intent to terminate the Osage Reservation upon its incorporation into the new State of Oklahoma. As the United States recognized, when the contention that the statutes are silent as to continued reservation status is rejected, as it must be, the Petition presents no substantial question. There is no conflict with this Court's prior disestablishment decisions or with the decisions of other circuits.

Petitioner continues to mischaracterize the record below. It still labels the striking demographic change beginning immediately after the dispositive acts (1907-1910) as "modern." (*Compare* Supp. Br. 3, *with* U.S. Br. 8-9 *and* Opp. Br. 20-23). Petitioner describes undisputed facts below showing unbroken treatment of Osage County as non-reservation land for pertinent *jurisdictional* purposes, including the shift of criminal enforcement on unrestricted fee lands from federal to state officials from 1907 to the present (*see* U.S. Br. 8-9, 18-19), as "lapses or inconsistencies" in executive policies toward the Osage. (Supp. Br. 6.) Petitioner does not support this charge with examples of jurisdictional treatment of Osage County fee lands that reflect reservation status. Instead, Petitioner relies on scattered references to an Osage "reservation,"

which is a mere "convenient geographical description," *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998), or recent decisions that do not apply this Court's analysis and are not entitled to deference. (*See* Opp. Br. 26-28.)

1. Contrary to Petitioner's assertions (Supp. Br. 3-8), the United States correctly concluded that "the court of appeals applied the proper analytical framework for determining whether a reservation has been disestablished or diminished." (U.S. Br. 9.) The United States refutes petitioner's proposal "that the court of appeals should have ended its analysis, and entered judgment in petitioner's favor, once it determined that the statutory text did not unambiguously support disestablishment." (*See* U.S. Br. 10 (*citing* Pet. 13-14, 18.) Rather, the United States correctly observed that this "Court has rejected the application of a 'clear-statement rule' that would require Congress to employ 'any particular form of words' to express its purpose." (U.S. Br. 10 (*citing* Pet. 13-14; Pet. Reply Br. 3-4, *and quoting Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Because (1) the pertinent statutes are not silent as to continued reservation status; (2) there is no applicable "clear-statement" rule; and (3) the courts of appeals apply consistent tests, *Morrison v. National Australia Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869, 2878 (2010) (Supp. Br. 3), does not provide guidance here.

This demand for a "clear-statement" rule, at the core of Petitioner's positions below and before this Court, bespeaks a fundamental misunderstanding of the context in which allotment era Congresses acted, and hence, of this Court's jurisprudence in this factbound setting. Given Congress' expectations during the allotment era, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Yankton Sioux*, 522 U.S. at 343 (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984)). As the United States demonstrates (U.S. Br. 5-9), the courts below reasonably examined each of the three elements of this Court's test: the statutory text, legislative history reflecting "historical context surrounding the passage of a surplus land act," and, to a lesser extent, "the subsequent treatment of the area." *Yankton Sioux*, 522 U.S. at 343, 344. Contrary to Petitioner's assertions (Supp. Br. 3), the courts below did not just "dutifully recite" this Court's disestablishment rules, but, as the United States demonstrates, they followed this "methodology." (U.S. Br. 5-9, 12)

2. Petitioner (Supp. Br. 4-7) does not rebut the United States' clear showing that no split in the circuit exists (U.S. Br. 11-15): Petitioner's "characterization of the asserted conflict misdescribes both the governing standards and the manner in which the court of appeals here applied it." (U.S. Br. 12.) As the United States

demonstrates, the Tenth Circuit's analysis does not conflict with the analysis of other circuits because the Tenth Circuit, like its sister circuits, employed "a methodology in which contemporaneous surrounding circumstances, *including* statutory history, are employed to *interpret* otherwise ambiguous text." (*Id.*) (emphasis in original). As the United States' showed, "unique statutes and different factual records" created different results, are not "quite beside the point" (Supp. Br. 8), and do not reflect a misapplication of this Court's governing legal standards. (U.S. Br. 13, 14.)

Petitioner's claim that *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) (Supp. Br. 4, 5), demonstrates the need for the Court to clarify its disestablishment analysis is confounded because the holding of that case, that allotted lands transferred to non-Indian ownership do not retain reservation status, does not conflict with either this Court's *Yankton Sioux* opinion or the Eight Circuit's subsequent decision on remand. First, *Bruguier*'s holding on disestablishment cannot conflict with *Yankton Sioux* because this Court did not reach that issue. *See Yankton* Sioux, 522 U.S. at 358. Second, on remand from *Yankton Sioux*, the Eighth Circuit concluded, like *Bruguier*, that "those lands originally allotted to tribal members which have passed out of Indian hands" no longer retain reservation status. *See Yankton Sioux Tribe v. Gaffey* ("*Gaffey II*"), 188 F.3d 1010, 1030 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000). As

the United States' *Daugaard* briefing recognized, "[c]ontrary to petitioners' assertion of a conflict between the decision below and the Supreme Court of South Dakota's decision in *Bruguier*, the actual holdings of the two cases are identical." U.S. Opposition Br., *Daugaard v. Yankton Sioux Tribe*, Nos. 10-929, 10-931, 10-932, 10-1058 ("*Daugaard* Br.") 18-20. However, even if there were some distinction between *Bruguier* and *Gaffey II*, that distinction would not support review because it is not relevant to the unique legislation and record here.

3. Petitioner is simply wrong that the United States' position in its current brief conflicts with its briefing in other cases. (Supp. Br. 2, 6-7.) To the extent the United States' position has evolved since it filed its brief in *Yankton Sioux* in 1997, that evolution conforms to, rather than departs from, this Court's guidance in *Yankton Sioux* and other reservation status cases. *See* U.S. Amicus Curiae Br., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) ("*Yankton* Br.")

In *Yankton Sioux*, *Daugaard*, and here, the United States has consistently urged the application of this Court's fairly clean analytical framework and has concluded that the relevant courts of appeals have applied that framework. *See* See *Yankton* Br. 8; *Daugaard* Br. 13; U.S. Br. 9-11, 12-13. Consistent with that framework, the United States has correctly acknowledged that "each case

involving whether a surplus land act has altered Indian reservation boundaries is unique, because '[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.'" *See Yankton* Br. 8 (quoting *Solem*, 465 U.S. at 469); *Daugaard* Br. 13; U.S. Br. 9, 13-14. Given the importance of these factors in discerning congressional intent, the United States has not limited its analysis to only the language of the relevant act, but has looked to contemporaneous legislation, events surrounding the enactment of the relevant act, including its legislative and negotiating history, and subsequent events and demographic trends. *See Yankton* Br. 8-29; *Daugaard* Br.13-18; U.S. Br. 9-11.

That the United States has never categorically insisted on the "all-or-nothing" approach Petitioner espouses is especially clear in the United States' *Yankton Sioux* brief. In *Yankton Sioux*, the relevant statute contained language of cession and payment of a sum certain, "hallmark" disestablishment language. *Yankton Sioux*, 522 U.S. at 344. Consistent with this Court's analytical framework, though, the United States evaluated other language in the Act, its legislative history, subsequent events, and demographic trends to argue that Congress did not intend to diminish the reservation. *Yankton* Br. 10-31.

Petitioner also contends that the United States is now departing from a prior position that other

disestablishment indicia cannot trump "countervailing evidence from Congress and the Executive Branch." (Supp. Br. 7 (quoting *Yankton* Br. 28)). The quoted language in the *Yankton Sioux* brief argued only that South Dakota's assertions of jurisdiction over the disputed lands "are not dispositive" given "countervailing evidence" that was contemporaneous with the passage of the 1894 Act (*see Yankton* Br. 20-24 (citing 1892 negotiations, congressional debates regarding 1894 Act, post-enactment Presidential proclamation), *not* recent non-jurisdictional references like those Petitioner advances here.

More to the point, here, the courts below relied on undisputed evidence indicating both Congress' intent and the Executive Branch's belief that the Osage Reservation was disestablished. Petitioner failed to provide *any* contemporaneous countervailing evidence, much less any evidence that the contemporaneous events or subsequent treatment of the land was contradictory or inconsistent. As the United States recognized (U.S. Br. 8), the historical evidence before the courts below "supported the conclusion that the Osage Reservation had been disestablished" and Petitioner "presented little, if any, historical evidence to the contrary." In fact, Petitioner's only "countervailing evidence" of the Executive Branch's position is contemporary, not contemporaneous, and thus of little, if any, value.

Contrary to Petitioner's assertion (Supp. Br. 8-9), the United States' brief *amicus curiae* in *Murphy v. Oklahoma*, 551 U.S. 1102 (2007) ("*Murphy* Br."), both reflects the Oklahoma-specific focus applicable here and supports, rather than undermines, the decisions below. Here, as in *Murphy*, a "series of Acts of Congress culminating in the grant of statehood to Oklahoma in 1906, as well as congressional action since that time," demonstrate that the former Osage reservation, like the Creek reservation in *Murphy,* was disestablished "as part of the process of allotting those lands, displacing tribal jurisdiction, and establishing the supremacy of state law and state jurisdiction." *Murphy Br.* 10. Unlike the United States' brief in *Murphy*, which concluded that the "statehood process underscores that the Creek Reservation was not preserved" (*Murphy* Br. 13), Petitioner's briefing here ignores, with the exception of a single citation to geographic references to "reservation," the intent and effect of the Oklahoma Enabling Act, passed the same month as the Osage Division Act.

4. Because this case does not present the interpretive issues Petitioner advances, the United States' is correct that: "Case-specific application of settled legal standards, focusing on distinct statutory provisions and historical circumstances does not merit this Court's review." (U.S. Br. 14). Given the unique factual and statutory background here, "granting certiorari in a case like this would

be unlikely to provide any useful guidance for future disestablishment or diminishment cases." (U.S. Br. 14; *Daugaard* Br. 13 (the Eighth Circuit "applied the standards repeatedly articulated by this Court to the particular facts and circumstances of the case. Such a fact-specific application of settled legal standards does not merit this Court's review." (citations omitted)). As the United States explained here: "Any criticism of the court of appeals' opinion would be directed at its circumstances-specific reasoning, not the legal framework it applied." (U.S. Br. 10.) Petitioner's suggestion that the *Osage* and *Yankton Sioux* petitions are related and may impact one another (Supp. Br. 13) is misplaced.

Moreover, the petitions for certiorari in *Yankton Sioux* do not challenge the *Gaffey II* court's holding that the Yankton Sioux reservation was diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *See Gaffey II*, 188 F.3d at 1030. Instead, the *Yankton Sioux* petitions challenge only the court of appeals' affirmance of the district court's conclusion that certain trust lands retain reservation status. Here, there is no dispute that trust and restricted fee lands retain their Indian country status. Given the fact-based analysis of each case, neither case will affect the other. There is no logical relationship between the cases that arguably supports Petitioner's suggestion that the

Court should grant *certiorari* here to provide additional context for the *Yankton Sioux* petitions.

II. NEITHER THE EXECUTIVE NOR CONGRESS HAS TREATED OSAGE COUNTY AS A CONTINUING RESERVATION.

Contrary to Petitioner's assertions (Supp. Br. 1), the Executive Branch and Congress have not repeatedly recognized the "continued existence" of an Osage reservation. Indeed, the acts the Petitioner cites acknowledge that the former reservation was incorporated into the State of Oklahoma as a county. The Act of March 2, 1917, Pub. L. No. 64-369, 39 Stat. 969, for example, (*see* Supp. Br. 4), declared that "all of Osage County, Oklahoma" shall be deemed Indian country for purposes of liquor control. The 1917 Act does not refer to an Osage reservation, and Petitioner does not explain why Congress would have needed to make such a declaration if it believed the Osage reservation continued to exist. Similarly, the Act of May 25, 1918, Pub. L. No. 65-159, 40 Stat. 561, §17, declared that Osage allottees may change the designation of "homesteads to an equal share of their unencumbered surplus lands" provided that "any order of change of designation shall be recorded in the proper office of Osage County," Oklahoma.

Nor do the cited portions of the 1938 Code of Federal Regulations (Supp. Br. 1) reflect jurisdictional treatment of Osage County as a reservation. Former 25 C.F.R. Part 177 (now long deleted, *see* 21 Fed. Reg. 6270, 6271 (Aug. 21, 1956)), which concerned agricultural leases, apparently never referred to an Osage "reservation." Instead, it referenced "Osage County, Oklahoma." *See* 25 C.F.R. § 177.3 (1949). 25 C.F.R. Parts 180 and 204, now renumbered as Parts 226 and 214, respectively, deal with oil, gas, and mineral leasing of the "Osage Mineral Estate," of course, "reserved" in trust for the Osage Nation and underlying Osage County.

III. THERE IS NO SOUND REASON TO ADDRESS RESERVATION STATUS STANDARDS IN THIS CASE.

1. Petitioner similarly fails to refute the United States' showing that this Court's review is unwarranted because, whether or not Osage County remains a reservation, this Court has recognized that Osage members are subject to Oklahoma income tax. Petitioner overlooks the repeated expressions of legislative intent in the Osage Division Act, the Enabling Act, and later statutes (*see* U.S. Br. 1-9) that Osage incomes be subject to state tax and misunderstands this Court's cases interpreting those acts. Petitioner's contention that *Choteau v. Burnet*, 283 U.S. 691

(1931), only affirmed the taxation in issue because the Osage Division Act "expressly authorized" taxation of lands after issuance of a certificate of competency (Pet. Supp. 11) is unsupportable. *Choteau* affirmed taxation of royalty income and proceeds of an inherited estate. *Choteau*, 283 U.S. at 692. *Choteau* holds that only "homestead" lands are not taxable; as to all other income and lands, *Choteau* confirms that Osage members are subject to taxation whenever they have "untrammeled ownership of the income in question." *Id.* at 696. Petitioner overlooks that what made the "*situation* wholly different" (Supp. Br. 12) in *United States v. Mason*, 412 U.S. 391, 396 n.7 (1973), (emphasis added), from the situation in *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164 (1973), was not the difference between the estate tax involved in *Mason* and the state income tax in *McClanahan*; rather, Osage, involved in *Mason*, unlike the Navajo Reservation in *McClanahan*, was a "case[] where Indians have left the reservation and become assimilated into the general community." *Mason*, 412 U.S. at 396 n.7 (quoting *McClanahan*, 411 U.S. at 171).

2. It is Petitioner (Supp. Br. 2), not the United States, that fails to come to grips with the "profound political, economic, structural, societal, and practical repercussions" of the request to judicially recognize a reservation that has been considered terminated for more than a century. United States Census records for the periods from

1910 through the 2000s establish that members of the Osage Nation have consistently constituted less than 7% of the total population of Osage County. *See* Opp. Br. 20-21. From 1907 to the present, law enforcement in Osage County has been almost exclusively a State or Osage County responsibility (Opp. Br. 21-23), and the United States advised that the "federal government currently focuses its prosecutorial efforts only on trust and restricted lands." (U.S. Br. 19.)

This Court has repeatedly recognized the importance of justifiable expectations premised on longstanding jurisdictional patterns. As the Court recognized in *Hagen*, 510 U.S. at 421, the "jurisdictional history" of federal and state actions demonstrated a "practical acknowledgment" that the reservation had been diminished and "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." As they accord weight to such "justifiable expectations," the decisions below comport with the decisions of this Court and do not warrant review. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215-16 (2005).

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

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IN THE
Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, WARDEN, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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ARGUMENT

Three months ago, this Court granted certiorari in *Madison County v. Oneida Indian Nation of New York*, No. 10-72 (cert. granted Oct. 12, 2010) to decide whether the Second Circuit properly analyzed the question of reservation disestablishment. But, on January 10, 2011, an intervening development caused this Court to vacate and remand that case without deciding the question. *Madison County v. Oneida Indian Nation of New York*, 562 U.S. ___, 2011 WL 55360 (Jan. 10, 2011) (per curiam order). This case now allows the Court to answer the important legal question posed by *Madison County*, while at the same time resolving an entrenched and expanding circuit and state-court conflict on the proper legal test for establishing congressional intent to disestablish a reservation.

The continuing need for this Court's review is underscored by the recent filing of multiple petitions for certiorari raising the disestablishment question and the lower-court conflicts in the governing law. *See Yellowbear v. Salzburg*, Pet. at i (second question presented), No. 10-7881 (filed Dec. 2, 2010); *Dauggard v. Yankton Sioux Tribe*, Pet. at i, No. 10-929 (filed Jan. 18, 2011); *Southern Mo. Recycling & Waste Mgmt. Dist. v. Yankton Sioux Tribe*, Pet. at i, No. 10-931 (filed Jan. 18, 2011); *Hein v. Yankton Sioux Tribe*, Pet. at i, No. 10-932 (filed Jan. 18, 2011).

Respondents devote most of their opposition to arguing the merits. Opp. 1, 4-29, 34-35. But that simply begs the question presented of what the proper legal test for documenting congressional intent to disestablish is. That is the question on

which the circuits and state supreme courts are divided and for which this Court's intervention to harmonize the law is needed, just as much as it was in *Madison County*.

Respondents' merits argument, moreover, simply replicates the Tenth Circuit's approach of using post hoc and extra-legislative material to *create* an ambiguity in congressional intent where none exists in the statutory text or legislative record, and then to resolve that extra-statutory ambiguity against the tribe and against the repeatedly expressed views of the United States. Encapsulating the doctrinal problem presented, respondents cast aside the Executive Branch's expert views of the statute's meaning and legislative context as "unfounded and uninformed speculation" (Opp. 26), to be supplanted by the now-controlling views of academicians (Opp. 16, 24-25).

In any event, the question at this juncture is not whether the Tenth Circuit's (or the Seventh Circuit's and South Dakota Supreme Court's similar) test of congressional intent is correct. The question is whether there should be one test for disestablishment or a variety of them that change with circuit- and state-court boundaries. After all, the Second Circuit in the *Madison County* case, the Eighth and Ninth Circuits, and the Wyoming Supreme Court have employed a different legal test that affords primacy to the direction given by the Political Branches. Pet. 8-11. If those courts are wrong, then Madison County, the State of Wyoming, Charles Mix County, the State of South Dakota, and the other governmental and private entities affected by reservation determinations in those jurisdictions

need and deserve the same unified national standard that the Osage Nation seeks here.

1. The Circuits and State Supreme Courts Are In Conflict.

The general test for disestablishment is settled: "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470, 478 (1984). Because the Constitution confides disestablishment to the Legislative Branch, courts must presume that reservations remain intact unless "Congress explicitly indicates otherwise" in a "clear statement" of its intent. *Ibid.*; *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (congressional direction must be "clear and plain").

Since this Court articulated that test in *Solem*, however, a conflict has arisen in the legal test employed by the courts of appeals and state courts to establish the requisite congressional clear statement. That is not surprising because the intervening years have witnessed significant clarification in the precedent governing "clear statement" rules in statutory construction and the primacy of statutory text. *See Morrison v. National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878, 2881 (2010) (rejecting decisions holding that, when a clear statement is required and the "Act is silent," "it was left to the court to 'discern'" congressional intent; instead, "congressional silence" means Congress has spoken against the proposition); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 37 (1992) ("If clarity does not exist" in statutory text, "it cannot be supplied by a committee report."); *Ardestani v. I.N.S.*, 502 U.S. 129,

137 (1991) (similar). The evolution in this Court's law thus makes the Court's intervention to reconcile conflicting approaches to the disestablishment "clear statement" rule even more imperative.

The fundamental problem with respondents' analysis is that it misunderstands the conflict. It is *not* over whether other sources, such as demographic statistics or historians, can ever be consulted to reinforce what statutory text indicates, but whether, under a congressional clear statement rule, such external indicia can *predominate* over statutory text and history.

Here, the Tenth Circuit straightforwardly acknowledged the complete absence of "express termination language" and that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." Pet. App. 14a. The court also confessed that the Osage Allotment Act contains three express indicia supporting continued reservation status: (i) authorization for the Secretary of Interior to set aside lands for tribal purposes; (ii) tribal members permitted to obtain allotments before the land was opened to non-Indians; and (iii) mineral resources reserved for the tribe as a whole. *Id.* at 13a-14a; *see Solem*, 465 U.S. at 474. Thus, the statutory text not only lacks explicit disestablishment direction, but in fact affirmatively "weigh[s] in favor of continued reservation status." Pet. App. 13a.

Nevertheless, the Tenth Circuit declared the Osage Reservation disestablished based on the statement of a single Osage member, not any Member of Congress. Indeed, no Member of Congress mentioned disestablishment. *See* Pet. 19; Pet. App.

15a-16a. The court also relied on historians' "treatises and articles in professional journals" that post-date the 1906 Act, Pet. App. 17a, while casting aside (Pet. App. 18a-19a) the longstanding views of the United States government embodied in statutory text, regulatory text, and agency action, *see* Pet. 22-27. Finally, the court invoked demographic statistics post-dating the Osage Act by 16 to 94 years. Pet. App. 21a.[1]

That is the problem. When the statutory text "weigh[s] in favor of continued reservation status," Pet. App. 13a, the law of the Second, Eighth, and Ninth Circuits and Wyoming Supreme Court is that such non-governmental and post hoc evidence cannot alone establish the required explicit congressional direction. Pet. 8-11.

The rule applied by the Second Circuit in *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197 (2005) – which this Court was to review in *Madison County* – is that, when there is an "absence of anything in the * * * Treaty's text or legislative history supporting disestablishment," post hoc or non-legislative evidence could not "'unequivocally reveal' the intention necessary to demonstrate disestablishment." *Id.* at 162. Absent any evidence in the treaty's "text [or] the circumstances surrounding its enactment and implementation," the Second Circuit held that the reservation continued.

---

[1] The court mentioned Congress's general allotment process, but then admitted that "the Osage were excepted from [it]." Pet. App. 15a. In any event, allotment is "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 496, 497 (1973).

Id. at 165. Indeed, respondents admit that the "subsequent treatment of the reservation" did not control in *Oneida* (Opp. 30). But subsequent treatment is all the Tenth Circuit relied on here, Pet. App. 20a-21a, beyond the single Osage member's inscrutable comment at a subcommittee hearing, Pet. 20, and an inapplicable general allotment policy.

The Second Circuit's position, moreover, conformed with the views of the United States. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 16-24, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855).

Likewise, the Ninth Circuit in *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), found it dispositive that (i) the statutory text contained "no mention of a change in reservation boundaries," *id.* at 1135; (ii) "no legislators mentioned or discussed the boundaries of the reservation or intimated that the boundaries would be changed by ratification of the 1893 Agreement," *id.* at 1136; and (iii) "from the initial 1855 Treaty to the present, the Bureau of Indian Affairs has provided services to the Nez Perce consistent with the existence of a reservation," *id.* at 1135, 1136.

Respondents' only answer is to say (Opp. 31) that *Webb* did not "mechanically" reject "evidence of contemporaneous understanding." That misses the point. The conflict concerns what contemporaneous evidence controls when the text favors or, at best, is silent about continued reservation status. While the Ninth Circuit in *Webb* recognized that "[t]he evidence is not unequivocal," it discounted the post hoc evidence on the ground that "events after

ratification" comprise "the category deemed least probative by the Supreme Court." *Id.* at 1137 n.15. That approach is precisely the opposite of that taken by the Tenth Circuit here.

Likewise, the Eight Circuit's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), is incompatible with the decision below. The Eighth Circuit confined its analysis of extra-textual sources to *congressional* documents that were contemporaneous with the legislation, *id.* at 1008-1010, and even then only to corroborate what was already "reflect[ed]" in the statutory text, *id.* at 1009. "Having found no congressional intent in the 1894 Act to divest [the] lands of their reservation status," the court could "only conclude that they remain reservation to this day." *Id.* at 1010. The Tenth Circuit, by contrast, deemed congressional silence an invitation to engage in the same "judicial-speculation-made-law" that this Court held in *Morrison* cannot satisfy a congressional clear-statement requirement. 130 S. Ct. at 2881.

Yankton Sioux, moreover, underscores the widespread contradictions in the law of disestablishment because the Eighth Circuit's ruling preserving the Yankton Sioux Reservation directly conflicts with the decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), holding that it was disestablished. The difference in outcomes encapsulates the doctrinal fault line in the conflicting court decisions. While the Eighth Circuit accorded primacy to statutory text and direct records of congressional intent, the South Dakota Supreme Court held that same reservation was "effectively terminated," *id.* at 378, because that

court afforded "persuasive bearing" to a post-legislative "change in regional character," *id.* at 375, notwithstanding the "uncertain provisions" in the relevant statute and "inconsistencies" in the historical record, *id.* at 374.

Respondents' citation (Opp. 31) of *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), confirms the problem. Again, the Eighth Circuit relied on the text and Senate Reports to hold that "the 1894 Act did not clearly disestablish the Yankton Sioux Reservation," and looked to post-enactment sources only as "further evidence that the nonceded lands retained their reservation status," *id.* at 1028. Tellingly, the Eighth Circuit also relied upon the historical and contemporary views of the federal government– evidence that the Tenth Circuit held here is "too far removed" (Pet. App. 19a). *See* 188 F.3d at 1029 (the United States "continues to argue today[] that the Yankton Sioux reservation was not completely disestablished in 1894").

Finally, respondents make no effort (Opp. 33 n.22) to address the conflict created by the Seventh Circuit's decision in *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009). *See* Pet. 11-12. Like the Tenth Circuit and the South Dakota Supreme Court, the Seventh Circuit rested its disestablishment inference on evidence originating "[i]n the aftermath of the act," even though that evidence indicated disestablishment only "for the most part." *Stockbridge-Munsee*, 554 F.3d at 665. *Contrast Webb*, 219 F.3d at 1137 n.15 ("Even if it were fully credited, the countervailing evidence at best creates an ambiguity which would have to be resolved in favor of the tribe.").

In short, respondents' understandably abbreviated effort to downplay the conflict misses the central contradiction in the law. That is (i) whether, even when the statutory text and statutory indicia are silent about disestablishment (or weigh in its favor), courts can judicially infer a clear *congressional* direction from evidence like the statements of Mr. Black Dog, four "Historian[s]," and statistics from 1920 and 2000, Pet. App. 16a-18a, and (ii) whether the views of the United States could be discarded as "unfounded and uninformed speculation" (Opp. 26; *see* Pet. App. 18a-19a). That is not a mere "difference[] in the records." Opp. 33. It is a fundamental divergence in how courts enforce *Solem*'s demand for "explicit[]" congressional direction, 465 U.S. at 470, and the legal significance accorded statutory text and the views of the Political Branches. That question merited this Court's review three months ago in *Madison County*, *supra*, and does even more so today.

2. The Tenth Circuit Decision Is Wrong And Contrary To This Court's Precedent.

Respondents' lengthy effort to defend the merits of their position is, alternatively, at war with the very decision they purport to defend, and a replication of the court of appeals' errors.

The respondents first argue (Opp. 8-16) that the statutory text commands disestablishment. The short answer is that even the Tenth Circuit disagrees. Pet. App. 13a-14a ("[N]either the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language," while the *Solem* factors "weigh[] in favor of continued

reservation status."). Whether respondents agree or disagree, the problem presented to this Court is that the Tenth Circuit has now adopted a legal test for judicially inferring a clear congressional statement without regard to such text that conflicts with the law of other circuits and state courts.

Respondents are, in any event, wrong. Their unsupported assertion (Opp. 9) that the Osage Act reserved the tribal mineral estate for the benefit of individual tribal members, rather than for the Osage Nation, defies both text and precedent. *See* Osage Act § 2 (Pet. App. 63a) ("reserved to the use of the tribe"); *id.* § 3 (Pet. App. 66a) ("reserved to the Osage tribe"); *ibid.* ("royalties [are] to be paid to the Osage tribe"); *West v. Oklahoma Tax Comm'n*, 334 U.S. 717, 721 (1948) ("Section 3 of the Act stated that the minerals * * * were to be reserved to the Osage Tribe.").

In addition, the fact that the Act permitted individuals to sell their allotted lands upon the issuance of certificates of competency (Opp. 11) proves petitioner's point. By making certificates of competency a prerequisite to sales, and by requiring federal approval before allottees could lease their property, Osage Act § 7 (Pet. App. 70a), Congress expressly maintained federal superintendence over the reservation lands.

Respondents' reliance on the Oklahoma Act (Opp. 14) fares no better. That legislation provided for the admission of Oklahoma to the Union, not the cession of tribal property. Nor does the statute's creation of a district coextensive with the Osage Reservation, Pub. L. 59-234 § 1, 34 Stat. 267, 268 (1906), indicate an intent to disestablish. *See Seymour v.*

Superintendent of Washington State Penitentiary, 368 U.S. 351, 358-359 (1962) (reservation continued even though land fell within townsite plot).

The Oklahoma Act's grant of rights associated with citizenship to Tribe members (Opp. 15-16) is equally consistent with continued reservation status. *See United States v. Celestine*, 215 U.S. 278, 289-290 (1909) ("[A]lthough made a citizen of the United States and of the state, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation.").

Finally, respondents' reliance (Opp. 1) on cases addressing the taxation of Osage members is misplaced. The results in *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), and *Choteau v. Burnet*, 283 U.S. 691 (1931), were mandated by the Osage Act, which authorized taxation of allottees who received certificates of competency. No original allottees with certificates of competency are still living, and *Leahy* and *Choteau* are inapplicable to their descendents. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 262-263 (1992) (declining to extend the General Allotment Act's grant of *in personam* jurisdiction over original allottees to subsequent Indian owners). The Court in *United States v. Mason*, 412 U.S. 391 (1973), expressly did not decide the taxability of an Indian estate's under the Osage Act, but only whether the United States breached its fiduciary duties by paying such tax. *Id.* at 397. And the holding in *West* was specifically limited to the estate-tax context, which "rests upon a basis different from that underlying a property tax." 334 U.S. at 727.

Thus, rather than help their cause, respondents' arguments underscore the fundamental defects in the Tenth Circuit's analysis and the problems that arise when courts resort to judicial discernment and third-party indicia to establish "explicit" congressional intent. When the statutory text contains no statement, let alone a clear statement; when the statute's content weighs in favor of continued reservation status; and when no Member of Congress whispered disestablishment-connoting words, basic separation of powers principles require the courts to stop there in their hunt for explicit congressional direction, as the Second, Eighth, and Ninth Circuits, and Wyoming Supreme Court have done. The contrary approach of the Tenth and Seventh Circuits and South Dakota Supreme Court, under which judicial inference substitutes for legislative direction and displaces the views of the Executive Branch, should be rejected.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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(10)

No. 10-537

In the Supreme Court of the United States

OSAGE NATION, PETITIONER

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Osage Nation retains a reservation in Osage County, Oklahoma, such that the State may not assess personal income taxes against Osage members who live on fee land and earn income within the original reservation boundaries.

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In the Supreme Court of the United States

No. 10-537

OSAGE NATION, PETITIONER

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1872, Congress set aside approximately a million and a half acres of what subsequently became the Oklahoma Territory as a reservation for the Osage Tribe of Indians, who had purchased that land following the sale of other tribal lands. Act of June 5, 1872, ch. 310, 17 Stat. 228; see *McCurdy* v. *United States*, 246 U.S. 263, 265 (1918). The area turned out to be rich with deposits of oil, natural gas, coal, and other minerals. *Ibid.* By the early 1900s, the Tribe's annual income

from leasing surface and mineral rights, plus interest from an $8 million trust fund, was nearly $1 million. *Ibid.*

b. In June 1906, Congress passed two laws addressing the status of lands in the Oklahoma Territory and affecting the Osage Reservation. The first was the Oklahoma Enabling Act, enacted on June 16, 1906, which described how the Oklahoma Territory and the neighboring Indian Territory could "adopt a constitution and become the State of Oklahoma." See Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267. "[N]othing contained in the said constitution" would "be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished)." *Ibid.* The state constitutional convention would specifically include two delegates elected by "electors residing in the Osage Indian Reservation," including qualified tribal members. § 2, 34 Stat. 268. Once a constitution was ratified and the State admitted to the Union, "the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." § 13, 34 Stat. 275; see § 21, 34 Stat. 277 (similar provision). The Act further instructed that the new state constitution "shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma." *Ibid.*

The second relevant statute, known as the Osage Allotment Act, was enacted less than two weeks later and "provided for an equal division" of the Osage trust fund and lands among the approximately 2000 tribal members. *McCurdy*, 246 U.S. at 265; see Act of June 28,

1906, ch. 3572, 34 Stat. 539. As to the money, all present and future funds were to be split among the tribal members and held in trust for them by the United States. § 4, 34 Stat. 544.

As to the land, each tribal member was permitted to select three allotments of 160 acres each, and would also receive an equal share of any land left over after all allotments had been selected. Osage Allotment Act § 2, 34 Stat. 540. The allottee would designate one of his three allotments as a "homestead," which would be "inalienable and nontaxable until otherwise provided by Act of Congress." § 2 Fourth, 34 Stat. 541. The other two allotments (plus any extra left-over land given to the tribal member) would be designated "surplus land," and would be inalienable for 25 years and nontaxable for three years, unless the Secretary of the Interior issued a "certificate of competency" to the allottee, thereby permitting earlier sale and taxation. § 2 Fourth & Seventh, 34 Stat. 541, 542. Certain specified tracts were reserved from allotment, including land "for the use and benefit of the Osage Indians, exclusively, for dwelling purposes" for 25 years; land for a boarding school; land for federal government buildings; and land including houses for the Osage chief and the United States interpreter (which were to be sold to those persons individually). § 2 Ninth-Eleventh, 34 Stat. 542-543.

Although the surface rights were allotted, all of the subsurface mineral rights were "reserved to the Osage tribe for a period of 25 years." Osage Allotment Act § 3, 34 Stat. 543. The mineral royalties were to be "distributed to the individual members of said Osage tribe," except for funds taken off the top to run the boarding school "and for other schools on the Osage Indian Reservation"; for operation of the Indian agency; and for an

emergency fund for the Tribe to "be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior." § 4 Second-Fourth, 34 Stat. 544. The Act stated that after 25 years, "the lands, mineral interest, and moneys, herein provided for and held in trust by the United States," would become the "absolute property of the individual members." § 5, 34 Stat. 544.

c. Oklahoma became a State in 1907. Pet. App. 7a. As required by the Oklahoma Enabling Act, the state constitution provided that the "Osage Indian Reservation with its present boundaries is hereby constituted one county to be know[n] as Osage County." *Ibid.* (quoting Okla. Const. Art. XVII, § 8). That county is today the largest in Oklahoma, encompassing roughly three percent of the State's total land area. *Ibid.* Most of the land in the county is held in fee simple, but certain "limited, scattered parcels" are held in trust by the United States for the Tribe or are allotments that remain under alienation restrictions. *Id.* at 33a. The United States also continues to hold the entire mineral estate in trust, pursuant to post-1906 statutes extending the trust period. See, *e.g.*, Act of Mar. 2, 1929, ch. 493, § 1, 45 Stat. 1478; Act of Oct. 21, 1978, Pub. L. No. 95-496, § 2, 92 Stat. 1660 (extending trust period in perpetuity).

2. a. In 1999, an Osage member who works for the Tribe on trust land, but lives on fee land, within the original boundaries of the Osage Reservation protested the State's taxation of her income. Pet. App. 8a. This Court has held that a tribal member who lives and works on an Indian reservation, or other "Indian country" as defined in 18 U.S.C. 1151, is immune from state income tax unless Congress expressly provides otherwise. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114,

123-126 (1993); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 167-173 (1973). The Oklahoma Tax Commission determined, however, that the tribal member's home was not in Indian country. Pet. App. 8a. In the Commission's view, only the trust and restricted lands within Osage County are Indian country, and the State may therefore tax the income of tribal members who live or work elsewhere. *Id.* at 33a.

The Commission's ruling prompted petitioner, the Osage Nation, to file suit in the District Court for the Northern District of Oklahoma against the State, the Commission, and respondent individual Commission members. Pet. App. 8a-9a. Petitioner sought a declaration that (1) the Osage Reservation has not been disestablished or diminished, and (2) tribal members living and working within the Reservation's original boundaries are exempt from state income tax. *Id.* at 8a. It also sought an injunction barring the State from collecting income taxes from such persons. *Ibid.* On an interlocutory appeal, the court of appeals held that the State and the Commission enjoyed sovereign immunity, but permitted the suit to proceed against respondents. *Id.* at 9a; see *Osage Nation* v. *Oklahoma*, 260 Fed. Appx. 13 (10th Cir. 2007), cert. denied, 129 S. Ct. 104 (2008).

b. The district court subsequently granted respondents' motion for summary judgment on the merits. Pet. App. 24a-56a. Applying the framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463, 470-471 (1984), for analyzing whether an Indian reservation has been disestablished (*i.e.*, eliminated entirely) or diminished (*i.e.*, reduced), the court determined that the "language of the 1906 Osage Allotment Act and the surrounding historical circumstances establish Congress' plain intent to terminate the Nation's reservation." Pet. App. 37a.

The district court observed that the Osage Allotment Act "effected the transfer of nearly all Osage tribal lands to its members," Pet. App. 37a; contemplated the sale of most of the non-allotted, reserved lands, *id.* at 38a; and left the tribal government with "few powers to exercise," *id.* at 40a. Although the Osage Allotment Act, and other statutes, referred to the "Osage Indian Reservation" as though it remained in existence, the district court concluded that these references were employed "only to describe a known geographic area." *Ibid.* The court found additional support for its disestablishment conclusion in the Oklahoma Enabling Act and the earlier Oklahoma Organic Act (Act of May 2, 1890, ch. 182, 26 Stat. 81), which in the court's view had both contemplated substantial state jurisdiction over Indian lands in Oklahoma. Pet. App. 40a-44a. Post-1906 congressional sources further "confirm[ed]" to the district court that the reservation had been disestablished. *Id* at 44a. For example, a 1935 Senate Report concerning the Oklahoma Indian Welfare Act, ch. 831, 49 Stat. 1967, stated that "all Indian reservations as such have ceased to exist" in Oklahoma. Pet. App. 44a (emphasis omitted) (quoting S. Rep. No. 1232, 74th Cong., 1st Sess. 6).

On the specific issue of Oklahoma's power to tax the income of tribal members, the district court concluded that "[w]ith respect to Osage lands in Osage County, the Supreme Court long ago recognized the Congressional intent that such lands be subject to state taxation." Pet. App. 50a (citing, *inter alia*, *Choteau* v. *Burnet*, 283 U.S. 691, 695 (1931)). The district court additionally concluded that petitioner's claims were equitably barred. *Id.* at 54a-56a.

c. The court of appeals affirmed. Pet. App. 3a-23a. It concluded that the reservation had been disestab-

lished, and therefore perceived no need to more specifically address the State's taxation authority or to address the district court's laches determination. *Id* at 22a-23a.

The court of appeals stated that it would address the disestablishment question through "the three-part test summarized in *Solem*." Pet. App. 10a. It explained that the *Solem* test seeks to determine "Congress's intent at the time of the relevant statute" by examining "(1) explicit statutory language"; "(2) surrounding circumstances"; and, to a lesser extent, "(3) subsequent events, including congressional action and the demographic history of the opened lands." *Id.* at 11a (internal quotation marks and citation omitted). The court noted, quoting *Solem*, that it would be proper to "infer diminishment * * * despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding passage of the act 'unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Ibid.* (brackets omitted) (quoting 465 U.S. at 471) . The court of appeals recognized that "there is a presumption in favor of the continued existence of a reservation"; that disestablishment "will not be lightly inferred"; and that "Congress's intent to terminate must be clearly expressed." *Id* at 10a (citing *Solem*, 465 U.S. at 470, 472, and *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

On the first *Solem* factor, the court of appeals concluded that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." Pet. App. 14a. The court observed that the Osage Allotment Act does not contain language that this Court in other contexts has found to weigh in favor of disestablishment, and does

contain some factors that this Court in other contexts has found to weigh against disestablishment. *Id.* at 13a-14a. For example, the Act did not immediately open up the land to non-Indian settlers, some lands were retained for tribal purposes, and the mineral estate was reserved for the Tribe in trust. *Ibid.*

On the second *Solem* factor, the court of appeals concluded that the "manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished." Pet. App. 15a. The court reasoned that the Act was passed at a time when the United States was seeking dissolution of Indian reservations, particularly in Oklahoma, and that the Osage were aware of this pressure and recognized that the allotment process would result in the loss of tribal land. *Id.* at 15a-16a; see *id.* at 17a ("The legislative history and the negotiation process make clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act."). The court also examined the views of several historians whose research supported the conclusion that the Osage Reservation had been disestablished. *Id.* at 17a-18a. The court of appeals additionally observed that petitioner had presented little, if any, historical evidence to the contrary. *Id.* at 18a.

As to the third *Solem* factor—subsequent events—the court of appeals concluded that the "uncontested facts support disestablishment." Pet. App. 20a. The court cited annual reports from the Superintendent of the Osage Indian Agency to the Commissioner of Indian Affairs in 1916, 1919, and 1920 indicating that the State had primary criminal jurisdiction in the area. *Id.* at 20a-21a. The court also relied on "uncontested popula-

tion demographics" showing a "dramatic shift in the population of Osage County" towards non-Indian residency and land ownership "immediately following the passage of the Osage Allotment Act." *Id.* at 21a-22a.

DISCUSSION

This Court's review of this case is not warranted. Neither the legal framework applied by the court of appeals nor the result it reached conflicts with any decision of this Court or another court of appeals. The unique statutory and historical circumstances of Oklahoma tribes in general, and the Osage Nation in particular, make this case an especially poor vehicle for addressing issues of reservation disestablishment, which are inherently statute-specific and fact-bound in any event. The reservation question, moreover, need not be addressed in this case because the lower courts reached the correct conclusion on the ultimate question of personal-income-tax immunity for Osage members living on fee land in Osage County. Certiorari should accordingly be denied.

1. Contrary to petitioner's contention (Pet. 12-15), the court of appeals applied the proper analytical framework for determining whether a reservation has been disestablished or diminished. The court of appeals correctly recognized that "there is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed." Pet. App. 10a; see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish must be "clear and plain") (citation omitted); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) (intent to diminish must be "clearly evince[d]"); *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975) (intent to disestablish must be "clear"). The court of ap-

peals also correctly recognized that the inquiry into Congress's intent encompasses the relevant statutory language; the legislative history and other contemporaneous surrounding circumstances; and, as a subsidiary consideration, subsequent events. Pet. App. 10a-12a; see, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343-344; *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem*, 465 U.S. at 470-471. The court of appeals then proceeded to examine those sources: it found no unambiguous termination language in the Osage Allotment Act or Oklahoma Enabling Act, Pet. App. 12a-14a; but it found "clear congressional intent" of disestablishment in the "manner in which the Osage Allotment Act was negotiated," *id.* at 14a-19a; and it determined that subsequent events further supported a disestablishment conclusion, *id.* at 19a-23a. Any criticism of the court of appeals' opinion would be directed at its circumstances-specific reasoning, not the legal framework it applied.

Petitioner suggests (Pet. 13-14, 18) that the court of appeals should have ended its analysis, and entered judgment in petitioner's favor, once it determined that the statutory text did not unambiguously support disestablishment. That suggestion is misplaced. The "most probative evidence" of diminishment or disestablishment "is, of course, the statutory text," *Yankton Sioux Tribe*, 522 U.S. at 344 (citation omitted), and "the statutory text must establish an express congressional purpose to diminish" before a court may so find, *Hagen*, 510 U.S. at 411 (internal quotation marks, brackets, and citation omitted). But, notwithstanding petitioner's suggestions to the contrary (Pet. 13-14; Reply Br. 3-4), the Court has rejected the application of a "clear-statement rule" that would require Congress to employ "any particular form of words" to express its purpose. *Ibid.*; compare, *e.g.*,

Yankton Sioux Tribe, 522 U.S. at 351 ("Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished."), with, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statutory text.").

Rather, courts should consider, as an aid to interpreting ambiguous text, "'the historical context surrounding the passage of the surplus land Acts,' and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *Hagen*, 510 U.S. at 411). In particular, as the court of appeals observed (Pet. App. 10a), this Court has explained that "[w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Solem*, 465 U.S. at 471; see *id.* at 469 n.10 (discussing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)).

2. Petitioner asserts (Pet. 7-12; Reply Br. 3-7) that the lower courts are in conflict in reservation-disestablishment cases as to "whether, under a congressional clear statement rule, external indicia" of the sort considered by the court of appeals here "can predomi-

nate over statutory text and history." Reply Br. 4 (emphasis omitted). That assertion is mistaken.

As a threshold matter, petitioner's characterization of the asserted conflict misdescribes both the governing standard and the manner in which the court of appeals here applied it. First, as just discussed, although Congress's "intent" to modify reservation boundaries "must be 'clear and plain,'" *Yankton Sioux Tribe*, 522 U.S. at 343 (citation omitted), the Court has declined to employ the sort of textual "clear statement rule" that petitioner posits. See pp. 10-11, *supra*. Second, petitioner's suggestion that the court of appeals in this case permitted "external indicia" to "predominate over statutory text and history" is inaccurate. Although the court of appeals' analysis is relatively brief, it describes a methodology in which contemporaneous surrounding circumstances, *including* statutory history, are employed to *interpret* otherwise ambiguous text. The court noted that certain textual factors might "weigh[] in favor of continued reservation status," but it found the text overall to be ambiguous. See Pet. App. 13a-14a; *id.* at 14a ("[T]he operative language of the statute does not unambiguously suggest diminishment or disestablishment."). Observing that "[i]f the statute is ambiguous, we turn to the circumstances surrounding the passage of the act," *ibid.*, the court proceeded to conclude that the "manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished," *id.* at 15a; see *id.* at 15a-16a.

In any event, petitioner errs in contending (Reply Br. 5) that "the law of the Second, Eighth, and Ninth Circuits and Wyoming Supreme Court" would reject the court of appeals' analytical framework in this case. Any

differences in the reasoning and results of the cases petitioner cites do not demonstrate a fundamental methodological conflict, but instead reflect the unique statutes and different factual records before each court.

The "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469). As in this case, each of the aforementioned courts in the cases cited by petitioner looked first to the statutory language, and then to the surrounding circumstances, in an effort to discern congressional intent. See *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 994, 1004-1006 (8th Cir. 2010), petitions for cert. pending, Nos. 10-929, 10-931 & 10-932 (filed Jan. 18, 2011), No. 10-1058 (filed Feb. 22, 2011); *Oneida Indian Nation* v. *City of Sherrill*, 337 F.3d 139, 161-165 (2d Cir. 2003), rev'd on other grounds, 544 U.S. 197 (2005); *United States* v. *Webb*, 219 F.3d 1127, 1134-1139 (9th Cir. 2000), cert. denied, 531 U.S. 1200 (2001); *Yellowbear* v. *State*, 174 P.3d 1270, 1282-1284 (Wyo. 2008). None of these cases held, as petitioner would have it, that surrounding circumstances are invariably irrelevant in the absence of a clear textual statement. Rather, the result in each case depended upon an examination of the specific surrounding circumstances at issue. See *Podhradsky*, 606 F.3d at 1005 (concluding that "exhaustive analysis of the historical materials surrounding the Tribe's agreement with the federal government and the 1894 ratification of that agreement, as well as the subsequent history," supported continuation of reservation); *Oneida Indian Nation*, 337 F.3d at 162 & n.20 (concluding that "certain legislative and administrative documents," which "indicate[d] little if anything about Congress's intent in 1838" at the time of the relevant treaty, and

were unpersuasive for other reasons, did not "'unequivocally reveal' the intention necessary to demonstrate disestablishment"); *Webb*, 219 F.3d at 1135-1136 (concluding that "[a]s to the circumstances surrounding the 1893 Agreement, a review of the pertinent evidence discloses nothing to impeach the district court's findings" favoring continuation of the reservation); *Yellowbear*, 174 P.3d at 1282-1283 (concluding that examination "in great detail" of the "events and circumstances pertaining to" the relevant Act supported diminishment).

It is to be expected that courts examining different statutes and different surrounding circumstances would sometimes find "unequivocal" evidence of disestablishment or diminishment, *Yankton Sioux Tribe*, 522 U.S. at 351, and sometimes would not. See *Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted). The Court's precedents "have established a fairly clean analytical structure" for disestablishment and diminishment cases, *Hagen*, 510 U.S. at 410-411 (citation omitted), but the application of that analytical structure is by necessity heavily dependent on the circumstances of the particular reservation, and there is a wide variety of potential factual scenarios. Case-specific application of settled legal standards, focusing on distinct statutory provisions and historical circumstances, does not merit this Court's review, see Sup. Ct. R. 10, and granting certiorari in a case like this would be unlikely to provide any useful guidance for future disestablishment or diminishment cases.

Petitioner relies (*e.g.*, Reply Br. 1) on the grant of certiorari in *Madison County* v. *Oneida Indian Nation*, 131 S. Ct. 704 (2011) (per curiam), for the proposition that the Court has recognized a need to provide further

guidance on reservation-disestablishment issues. The Court's disposition of that case in fact indicates the opposite. The case presented two questions, only the second of which involved disestablishment. *Ibid.* The Court dismissed the case before argument when the primary question was mooted, notwithstanding the petitioner's argument that "there are many other questions to be resolved in this litigation, including the second question presented to this Court (whether the ancient Oneida reservation in New York was disestablished or diminished)." Letter from David M. Schraver, Counsel of Record for Petitioners, to Hon. William K. Suter, Clerk of Court 3, No. 10-72 (Dec. 1, 2010); see *Madison County*, 131 S. Ct. at 704. The Court thus concluded that the disestablishment issue in *Madison County* did not independently warrant review. The disestablishment issue in this case similarly does not warrant review.

3. This case, in any event, would be a particularly poor vehicle for addressing disestablishment and diminishment questions. It has long been recognized that Oklahoma tribes have an anomalous statutory and historical backdrop that legally distinguishes them in various ways from tribes in other regions. See, *e.g.*, 1 Felix S. Cohen, *Handbook of Federal Indian Law* 425 (1st ed. 1942) (stating, in chapter on "Special Laws Relating to Oklahoma," that in some respects, "Oklahoma Indians, or certain groups thereof, are excluded from the scope of * * * statutes and legal principles" generally applicable to other Indians). And even within the singular context of Oklahoma, the Osage Nation presents a special case. See, *e.g.*, *id.* at 446-455 (section on "Special laws governing Osage Tribe," including subsection on distinctive allotment laws).

Although Congress has disestablished the formal reservations of other Oklahoma tribes, Gov't Br. at 17-20, *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787), it is unclear whether Congress went so far as to disestablish the Osage Reservation. As the court of appeals recognized, aspects of the Osage Allotment Act—some set-asides of lands for several tribal purposes, virtually exclusive initial allocation of land to tribal members, and retention of mineral rights for the Tribe—can imply a continuing reservation. Pet. App. 13a-14a; see *Solem*, 465 U.S. at 474. Additional factors—including the present-tense references to the Reservation in the Osage Allotment Act and the Oklahoma Enabling Act, see, *e.g.*, Oklahoma Enabling Act § 2, 34 Stat. 268; Osage Allotment Act § 4 Third, 34 Stat. 544—may point in a similar direction.

There is no need, however, to resolve the disestablishment question in this case. Even if Congress did not disestablish the Osage Reservation, its sui generis treatment of the Osage clearly contemplated a unique degree of state authority within the original Reservation boundaries. That authority includes the assessment of the personal income taxes at issue here.

a. Congress expressly incorporated the Osage into the political structure of the emerging State of Oklahoma in a manner that anticipated at least some state authority over tribal members and their lands. Congress specifically provided for Osage members to vote for delegates to the state constitutional convention, who would participate in writing the laws that would govern the State. Oklahoma Enabling Act § 2, 34 Stat. 268. Congress additionally required that the Reservation be designated its own county, thereby encapsulating it as a single political subdivision of the State and presumably

intending to vest it with some measure of local governmental authority. And the Act left the Oklahoma legislature free to alter the county boundaries once "the lands in the Osage Indian Reservation are allotted in severalty," § 21, 34 Stat. 277, thus identifying the replacement of tribal ownership with individual ownership—to be followed by state taxation and alienability of two-thirds of the allotments, Osage Allotment Act § 2 Seventh, 34 Stat. 542—as also triggering additional state authority, at least to the extent of allowing the State to redraw political boundaries. These statutory provisions for the Osage Tribe are unique, and serve to distinguish that Tribe from other tribes involved in prior disestablishment cases.

In addition, provisions of the Osage Allotment Act and the Oklahoma Enabling Act expressly authorized certain state authority within the original Reservation boundaries. As just noted, the Osage Allotment Act authorized state taxation of surplus allotments three years after the passage of the Act. It also specified that state law would generally govern tribal-member inheritance of "the lands, moneys, and mineral interests, herein provided for," and that "public highways or roads" of certain description could be "established without any compensation therefor." §§ 6, 10, 34 Stat. 545. The Oklahoma Enabling Act banned alcohol manufacture and sale on Osage land only for 21 years, after which state regulation would be permitted. § 3 Second, 34 Stat. 269.

More generally, the Oklahoma Enabling Act did not assert the same federal jurisdictional authority over Indian lands in Oklahoma as it did over Indian lands in another potential State enabled by the same statute, which would have included the Arizona and New Mexico Territories. See generally Oklahoma Enabling Act

§§ 23-41, 34 Stat. 278-285 (enabling residents of those territories, had they so chosen, to join the Union as a single State of Arizona). As to the latter State, Congress provided that "all lands lying within [its] limits owned or held by any Indian or Indian tribes * * * shall remain under the absolute jurisdiction and control of the Congress of the United States." § 25 Second, 34 Stat. 279 (requiring potential Arizona constitution to "forever disclaim right and title" to public and Indian lands and specifying that Congress would retain jurisdiction over both). Congress enacted no such provision for Indian lands in Oklahoma. See § 3 Third, 34 Stat. 270 (requiring potential Oklahoma constitution to "forever disclaim all right and title" to public and Indian lands, but specifying only that Congress would retain jurisdiction over public land). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

The historical record in this case (which is not well-developed) moreover contains no clear evidence that the federal government has exercised meaningful criminal jurisdiction over unrestricted fee lands in Osage County. The United States has long asserted, and the Court has long recognized, federal criminal jurisdiction over trust and restricted lands within the original boundaries of the Osage Reservation. See *United States* v. *Ramsey*, 271 U.S. 467 (1926) (upholding federal criminal jurisdiction on restricted Osage allotments). Fee lands on an Indian reservation would generally fall under federal criminal superintendence as well. See 18 U.S.C. 1151(a),

1152, 1153; see, *e.g.*, *Donnelly* v. *United States*, 228 U.S. 243, 253-254 & n.2 (1913); see also Act of Aug. 15, 1953, § 1, 67 Stat. 588 (18 U.S.C. 1162) (providing specific mechanism, not applicable here, for state criminal jurisdiction over Indian country). But the court of appeals observed that early reports from the local federal Superintendent to the Commissioner of Indian Affairs contemplated state criminal jurisdiction in Osage County, Pet. App. 20a-21a, and *Ramsey*'s focus on whether a restricted Osage allotment qualified as Indian country for purposes of federal criminal jurisdiction would have been too narrow if federal criminal jurisdiction had been understood to extend throughout Osage County. And this Office has been informed that the federal government currently focuses its prosecutorial efforts only on trust and restricted lands. See 18 U.S.C. 1151 (classifying such lands as "Indian country").

b. All of this is not to say that Osage sovereignty over lands within the original 1872 reservation has been entirely displaced. It is undisputed, for example, that the remaining restricted allotments and trust lands are "Indian country" under federal law, 18 U.S.C. 1151, and the Osage Nation thus retains some sovereignty (including tax immunity for tribal members) there. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993). Existing precedents, however, are inconsistent with petitioner's contention that Osage members living on fee land within original Reservation boundaries enjoy immunity from state personal-income tax.

The Court has long recognized that the special treatment of certain Oklahoma tribes allows for an extraordinary degree of state taxation that may be impermissible elsewhere. See, *e.g.*, *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 603 (1943) (observing, in case in-

volving other Oklahoma tribes, that the "underlying principles" of other Indian taxation decisions "do not fit the situation of the Oklahoma Indians"). Even within Oklahoma, the treatment of the Osage has been particularly distinctive. With limited exception, see *McCurdy* v. *United States*, 264 U.S. 484 (1924), the Court has consistently upheld state taxation of tribal members. See, *e.g.*, *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948) (upholding application of state inheritance tax to Osage member's trust fund, including interest in mineral rights). This has included state taxation of tribal members' personal income.

In *Choteau* v. *Burnet*, 283 U.S. 691 (1931), the Court held that an Osage member was required to pay federal income tax on his income from the Tribe's mineral leases. The Court determined that the member's "status as an Indian" did not exempt him from the tax, observing that "[n]o provision in any of the treaties referred to by counsel has any bearing upon the question of the liability of an individual Indian to pay tax upon income derived by him from his own property." *Id.* at 694. Examining the Osage Allotment Act, the Court reasoned that once petitioner had received a certificate of competency enabling him to sell his non-homestead allotments, he became "taxable" upon those lands. *Id.* at 695. "It is evident," the Court stated, "that as respects his property other than his homestead his status is not different from that of any citizen of the United States." *Ibid*

In *Leahy* v. *State Treasurer*, 297 U.S. 420 (1936), the Court applied that same logic to state taxation. The petitioner there, an Osage member who had received a certificate of competency, challenged Oklahoma's taxation on his mineral-lease income. *Id.* at 421. The Court disposed of the substance of the challenge in a single three-

sentence paragraph. It observed that the "facts are substantially the same as those presented in" *Choteau*; that the "applicable statutes and decisions are discussed there"; and that because the petitioner "was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." *Ibid.*

Petitioner argues (Reply Br. 11) that the results in *Choteau* and *Leahy* were "mandated by the" Osage Allotment Act, "which authorized taxation of allottees who received certificates of competency," and that those cases are therefore "inapplicable to [the] descendants" of the original allottees. But, contrary to petitioner's contention, there is nothing in the Osage Allotment Act that specifically authorized taxation of original allottees who received certificates of competency. The case on which petitioner relies—*County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 262-263 (1992)—concerned the *General* Allotment Act, not the *Osage* Allotment Act. The General Allotment Act does contain a provision expressly applying state law to original allottees, and this Court held in *County of Yakima* that the provision does not authorize personal taxation of the descendants of those original allottees. See 25 U.S.C. 349 (providing that once allotments are held in fee, "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside"); *County of Yakima*, 502 U.S. at 262 (rejecting construction "that would extend the State's *in personam* jurisdiction beyond the section's literal coverage ('each and every *allottee*') to include *subsequent* Indian owners (through grant or devise) of the allotted parcels").

The Osage, however, were expressly excepted from the General Allotment Act, ch. 119, § 8, 24 Stat. 391, and the Osage Allotment Act contains no similar provision. See § 2 Seventh, 34 Stat. 542 (discussing taxation of land rather than taxation of allotees); cf. *United States* v. *Mason*, 412 U.S. 391, 397 (1973) (observing that cases arising "under the General Allotment Act rather than the Osage Allotment Act" were "of questionable relevance" in a case concerning the Osage). The Court's decisions in *Leahy* and *Choteau* accordingly did not rest on any legal principle applicable only to original allottees, and they are consistent with the Court's view that the peculiar circumstances of the Osage justify a distinct approach to the question of state taxation.

The lower courts therefore correctly denied petitioner's request for declaratory and injunctive relief regarding tax immunity. For that reason, and in light of the unique circumstances of the Osage Tribe and its reservation, the nature of the court of appeals' ruling, and the absence of a conflict in the lower courts, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-537

In The Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that "only Congress can divest a reservation of its land and diminish its boundaries," and Congress's intent to do so must be "explicit[ ]" and "unequivocal," *id.* at 470-471. The Questions Presented are:

I. Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.

II. Whether the court properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government.

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STATEMENT OF INTEREST[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribes, states and the federal government on a wide-range of Indian issues, including the relevance and legal interpretation of treaties, statutes and executive orders setting aside or establishing reservations as permanent homelands for Indian tribes.

Amicus curiae is deeply concerned that the legal test for disestablishment adopted by a minority of the circuits will allow lower federal and state courts to ignore specific language within a statute or treaty, to overlook the contemporaneous Congressional purpose underlying an allotment or surplus land act, and to simply rely on subsequent historical events and modern demographics to determine reservation status. Diminishment or disestablishment of a reservation—a homeland set-aside for the tribe and its members—is a question of exceptional importance.

---

[1] No counsel for a party authored the brief in whole or part. No counsel for a party made a monetary contribution to the preparation or submission of the brief. The counsel of record for each party received timely notice of the intent of *amicus curiae* to file this brief and written consent was granted by each party.

Left unaddressed by this Court, the minority position will open the flood-gates for litigation by anyone who wishes to challenge—for any reason—the status of lands within a reservation as "Indian country." The decision by the lower court will create uncertainty over long-established reservation boundaries which will threaten federal, state and tribal law enforcement efforts. The increasing uncertainty is already affecting the ability of federal agencies to fulfill their statutorily mandated obligations to tribes, and the accompanying economic, social and legal instability is beginning to erode the ability of tribes to achieve self-determination and economic self-sufficiency.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In their petition for writ of certiorari, petitioner Osage Nation has effectively demonstrated why this Court should grant review of the questions presented. First, it is absolutely clear that the decision below expands and entrenches an inter-circuit conflict over the legal test for disestablishment of an Indian reservation. Pet. at 7-12. Second, the minority position adopted by the court of appeals below—that a reservation can be disestablished without explicit support in the text of the statute or the announced view of the political branches—squarely conflicts with this Court's precedent. Pet. at 12-28. Petitioner has fully articulated the arguments underlying these first two

bases for review by this Court and *amicus* will not repeat those arguments here.

Rather, *amicus* seeks to bring additional relevant material to the attention of the Court in relation to the final basis for review: questions of diminishment and disestablishment are of exceptional importance and are recurring nationwide. As the petitioner warns, the divergence by the court of appeals below from this Court's precedent and from a majority of other circuits will "wreak havoc" throughout Indian country and across the states and federal government. Pet. at 28.

1. The Questions Presented in this Case Are Fundamental to the United States' Policy Supporting Indian Self-Determination.

The question of diminishment or disestablishment of reservation boundaries is one of exceptional importance to Indian tribes nationwide as they pursue self-determination and economic self-sufficiency. Indian self-determination has been the formal policy of the United States government since President Nixon's Special Message to Congress on Indian Affairs in 1970, and has been affirmed by executive order or proclamation by each U.S. President since.[2]

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[2] President Richard Nixon, Special Message to Congress on Indian Affairs (July 8, 1970). For relevant executive orders, see Exec. Order No. 13,336, 69 Fed. Reg. 5295 (Apr. 30, 2004) (President George W. Bush: "This Administration . . . supports tribal sovereignty and self-determination"); Exec. Order No.

(Continued on following page)

Certainty and stability are necessary ingredients for the successful pursuit of these goals. As discussed more fully below, the inconsistency of the disestablishment analysis between the circuits contributes to the confusion surrounding jurisdictional authority in two key areas: (1) whether a tribe, a state, or the federal government has authority to prosecute crimes; and (2) whether a tribe, a state, or the federal government is responsible for social service programs, environmental protection, land use decisions, and business regulation.

13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (President William J. Clinton: "[t]he United States . . . supports tribal sovereignty and self-determination."); Exec. Order No. 12,401, 48 Fed. Reg. 2309 (Jan. 14, 1983) (President Ronald Reagan: "the underlying principles of this mission are the government-to-government relationship, the established Federal policy of self-determination and the Federal trust responsibility"). For relevant presidential proclamations, see Proclamation No. 8595, 75 Fed. Reg. 67907 (Oct. 27, 2010) (President Barack Obama: "[This Administration] recommit[s] to supporting tribal self-determination, security, and prosperity for all Native Americans."); Proclamation No. 8313, 73 Fed. Reg. 65491 (Oct. 30, 2008) (President George W. Bush: "My Administration remains committed to protecting tribal sovereignty and the right to self-determination and to working with tribes on a government-to-government basis."); Proclamation No. 7247, 64 Fed. Reg. 60085 (Nov. 1, 1999) (President William J. Clinton: "My Administration is expanding consultation and collaborative decision-making with tribal governments to promote self-determination."); Proclamation No. 6230, 55 Fed. Reg. 48095 (Nov. 14, 1990) (President George H. Bush, "Today, we reaffirm our support for increased Indian control over tribal government affairs, and we look forward to still greater economic independence and self-sufficiency for Native Americans.").

Historically, the relationships between the United States, the States, and Indian tribes have been marked by long periods of conflict with intermittent periods of cooperation. In modern times, these relationships have been marked more by periods of sustained cooperation than conflict. The development of the law during these alternating periods of conflict and cooperation are instructive to the questions presented.

In a series of early Indian law cases referred to as the "Marshall Trilogy," this Court established the key principles underlying the doctrine of inherent tribal sovereignty. *Johnson v. McIntosh,* 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832) ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil. . . ."). Felix Cohen, the first and foremost modern scholar of federal Indian law, articulated the principles of the Marshall Trilogy as follows:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self government. (3) These powers are subject to qualification by Congress, but save as thus expressly qualified, full powers of

> internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW 123 (1941).

It is generally known that allotment and assimilation were adopted as policies by the United States to deal with the "Indian problem." *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1041 (Nell Jessup Newton ed., 2005). "Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1015-16 (8th Cir. 1999) (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972)).

Under pressure from westward-bound homesteaders, railroads, mining interests, etc., Congress enacted the General Allotment Act of 1887, 24 Stat. 388 (Feb. 8, 1887), to expedite the allotment process and to apply it to Indian tribes and their reservations nationwide, with limited exceptions (including the Osage Nation). The principle provisions of the General Allotment Act provided for the allotment of commonly held tribal lands to individual Indians, 160 acres to each family head or 80 acres to each single person over eighteen years of age. The United States would hold each allotment in trust for a period of twenty-five years during which time the lands could not be alienated or encumbered.

Initially, the Executive Branch was charged with the responsibility of allotment under the provisions of the General Allotment Act. But Congress became impatient and began to adopt special legislation aimed at individual Indian reservations. REPORT OF THE BOARD OF INDIAN COMMISSIONERS 153 (1889). Thus, the actual allotment of land on many reservations was primarily accomplished through specific legislation, with each allotment or surplus land act employing its own statutory language, the product of a unique set of tribal lobbying and legislative compromise. *See* COHEN'S HANDBOOK at 1041 (2005). As this Court recognized in *Solem v. Bartlett*, 465 U.S. 463 (1984) the modern legacy of these allotment and surplus land acts

> has been a spate of jurisdictional disputes between State and Federal officials as to which sovereign has authority over lands that were opened by the acts and have since passed out of Indian ownership. As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, Federal, State, and Tribal authorities share jurisdiction over these lands if the relevant act did not diminish the existing Indian reservation because the entire area is Indian country under 18 U.S.C. §1151(a).

Solem, 465 U.S. at 467.

In its 1934 "Report on Land Planning, Part X, Indian Land Tenure, Economic Status and Population

Trends," the Natural Resources Board describes the principal methods for dispossessing tribes of their communal lands:

> *"Ceded" Surpluses After Allotment.*—A practice consistently pursued was to separate all land from the reservation which was left over after a tribe was allotted in severalty, usually by remunerating the members thereof at $1.25 an acre. . . . At least 38,000,000 acres of Indian land were disposed of in this way.
>
> *Surplus Lands Opened to Settlement.*—A similar practice was to throw open surpluses left over after allotment, to settlement by whites, and remunerate the tribes as the lands were entered by homesteaders. At least 22,000,000 acres of Indian land have thus been lost.
>
> *Alienation Through Fee Patents.*—The grant of fee patents at the end of the trust period and the removal of sales restrictions account for the loss of about 23,000,000 acres. Indians who retained their land after coming into full control over it were rare exceptions. The granting of fee patents has been practically synonymous with outright alienation.

NATIONAL PLANNING AND PUBLIC WORKS, NATURAL RESOURCES AND INCLUDING LAND USE AND WATER RESOURCES, NATIONAL RESOURCES BOARD REPORT, PART X at 6 (November 28, 1934).

The assimilation and allotment policies resulted in the impoverishment of Indian people, loss of their land base, and the destruction of their cultural identities. In 1928, the Institute for Government Research issued *The Problem of Indian Administration,* a report sponsored and initiated by the federal government, which examined contemporary life for tribal communities nationwide. LEWIS MERIAM ET AL., INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). The *Meriam Report* conveyed a particularly troubling portrait of the poverty, health risks, weak economic prospects, and lack of access to education in Indian country. At the root of this social malaise, the *Meriam Report* found years of "past policies adopted by the government in dealing with the Indians . . . which, if long continued, would tend to pauperize any race." *Id.* at 7.

In 1934, Congress repudiated this allotment policy in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 478 (2006). In all, over 86 million acres of tribal lands were separated from Indian ownership between 1887 and 1934. During this period, 118 Indian reservations had been allotted, 44 of which had been opened to homestead entry by non-Indians under the public land laws. AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 309 (Comm. Print 1977).

The IRA provided a Congressionally-sanctioned vehicle for tribes to develop their own forms of government under constitutions approved by the federal

government and to participate in the management of their tribal resources. The IRA refocused Congressional efforts toward acknowledging tribal governments, cultural pluralism, and Indian self-determination in the hope that these new programs would build Indian economies at a time when the country, as a whole, was struggling through the depths of the Great Depression.

In the mid-1940s, the period of Indian reorganization was abruptly abandoned and policies aimed at terminating the federal relationship with tribes were pursued. On July 1, 1952, the House of Representatives passed a resolution calling for legislative proposals "designed to promote the earliest practicable termination of all federal supervision and control over Indians." H.R. Rep. No. 82-2503, 82d Cong. 2d Sess. (1952). On August 1, 1953, Congress passed House Concurrent Resolution 108 calling for Indians to "be freed from Federal supervision and control and all disabilities and limitations." H.R. Cong. Res. 108, 83d Cong., 67 Stat. B132 (1953). And by 1954, Congress had adopted specific acts to terminate over 70 tribes. *See* Charles F. Wilkinson and Eric R. Biggs, *The Evolution of the Termination Policy,* 5 AM. IND. L. REV. 139, 151-54 (1977). And the results of termination were tragic on many levels, in particular, the loss by terminated tribes of their entire land base. *See* COHEN'S HANDBOOK at 94-96 (2005).

Then, during the civil rights era, the pendulum of federal Indian policy swung back toward tribal self-determination. In 1970, President Nixon declared: "Self-determination among the Indian people can and must be encouraged without the threat of eventual termination."[3] In 1975, Congress followed the lead of the Executive Branch and enacted the Indian Self-Determination and Educational Assistance Act, Pub. L. No. 93-638, 25 U.S.C. §§ 450-450e-3 (2006). The policy of Indian self-determination allows Indian tribes to contract for federal funds to administer programs and services for the benefit of tribal members and their communities.

In the modern era, Congress has continued to affirm its support of tribal autonomy in numerous acts and policies: social services and child welfare, *see* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2006); housing, *see* Native American Housing and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4104 (2006); environmental and land use authority (e.g., environmental protection, land use, and zoning) *see* Indian Lands Open Dump Cleanup Act of 1994, 25 U.S.C. §§ 3901-3908 (2006), Indian Energy Act, 25 U.S.C. §§ 3501-3506 (2006); cultural resources protection, *see* Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§3001-3013 (2006); and economic development, *see* Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721

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[3] President Richard Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), available at http://www.presidency.ucsb.edu/ws/index.php?pid=2573.

(2006), Native American Business, Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301-4307 (2006).

The above acts are only a sampling of modern federal Indian legislation, but all have a shared characteristic of highlighting the reality that a tribe's ability to exercise "many of its sovereign powers hinges, in large part, on whether its actions occur in Indian Country." Charlene Koski, *The Legacy of Solem v. Bartlett: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 763-764 (2009). In fact, almost every federal program and service available to an Indian tribe stands to be negatively affected by a finding of diminishment or disestablishment of the boundaries of their reservation.

a. Inconsistency in Disestablishment Analysis Complicates the Administration of Criminal Justice Throughout Indian Country and Encumbers Law Enforcement Cooperation Between the United States, Tribes, and States.

The question of disestablishment goes to the very heart of criminal jurisdictional analysis in federal Indian law, whose threshold inquiry is whether an act occurred within "Indian country." Prior to 1948, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had

not yet been claimed by non-Indians." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (citations omitted).

The definition of "Indian country," employed in the context of criminal law, was revised by Congress in 1948 when it "uncouple[d] reservation status from Indian ownership." *Solem*, 465 U.S. at 468. Thus, "Indian country" means:

> (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory, and whether in or out of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

Thus, since 1948, a non-Indian's ownership of land within an Indian reservation on which a crime is committed does not change its reservation status and remove it from Indian country. *See Beardslee v. U.S.*, 541 F.2d 705 (8th Cir. 1976) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975)). As this Court has recognized, only Congress has the power to change a reservation's status, *Solem*, 465 U.S. at 472, and the intent to diminish or disestablish a reservation's boundaries must be clearly

expressed, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and will not be lightly inferred. *Solem*, 465 U.S. at 472.

The inter-circuit conflict, as highlighted by the present case, exacerbates the jurisdictional maze that characterizes the administration of criminal justice in Indian country. Although space limitations preclude a full discussion of criminal jurisdiction in Indian country, the chart below provides an abbreviated description to assist this Court in conceptualizing the complexity of this jurisdictional question.[4]

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[4] Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 560 (2009) (This chart is inapplicable to the six mandatory Public Law 280 states in which Congress delegated the federal government's criminal 18 U.S.C. § 1162 (2006) and civil jurisdictional responsibilities over Indian country. 28 U.S.C. § 1360 (2006). For a more detailed description of Public 280s provisions and effects, *see* Vanessa Jimenez, Soo Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 AM. U. L. REV. 1627 (1998)).

Perpetrator/ Victim	Jurisdiction	Source of Authority
Crimes By Indians Against Indians		
Major Crimes	Federal or Tribal (concurrent)	Indian Major Crimes Act, 18 U.S.C. § 1153 (2006)
Non-Major Crimes	Tribal (exclusive)	Inherent Sovereign Authority
Crimes By Indians Against non-Indians		
Major Crimes	Federal or Tribal (concurrent)	Indian Major Crimes Act
Non-Major Crimes	Federal or Tribal (concurrent)	Indian General Crimes Act, 18 U.S.C. § 1152 (2006) (federal); Inherent Sovereign Authority (tribal).
Victimless Crimes by Indians	Federal or Tribal (federal authorities have jurisdiction over general federal crimes; tribal authorities have jurisdiction over non-federal victimless crimes, such as vandalism or public intoxication)	Inherent Sovereign Authority

Crimes by non-Indians Against Indians	Federal (exclusive)	Indian General Crimes Act (incorporates non-federal state offenses via the Assimilative Crimes Act, 18 U.S.C. § 13 (2000))
Crimes by non-Indians Against non-Indians	State (exclusive)	*United States v. McBratney*, 104 U.S. 621 (1882)
Victimless Crimes by non-Indians	State (exclusive)	

Inconsistency in disestablishment analysis by the courts below further impedes the prosecution of crime, and the protection of tribal and non-tribal communities. At present, the law determining the very boundaries of "Indian country" differs amongst the circuits. The suspicion that is currently cast on a tribe's reservation status, despite unambiguous statutory language evidence and equivocal legislative history, threatens to throw the administration of criminal justice into disarray. This present state of disestablishment analysis may result in more and more litigation over reservation boundaries before it can be determined whether the federal government, the state, or the tribe has authority to prosecute a crime. In the absence of a clear and uniform rule, valuable judicial

resources must be expended to answer this threshold inquiry.

For tribal communities, the potential impacts on the ground will be felt immediately. Today, on average, American Indians experience violent crime at more than twice the rate for the Nation (*i.e.*, 101 victims for every 1000 persons, compared to 41 per 1000). *See* U.S. Department of Justice, Bureau of Justice Statistics, *Statistical Profile, 1992-2002: American Indians and Crime* (2004).[5] In addition, the uncertainty of reservation status may result in an upsurge of federal declinations to prosecute major crimes which, for multiple reasons, already plague Indian country. *See Tribal Law and Order Act: Hearing on S.797 Before the S. Comm. on Indian Affairs*, 111th Cong. 93 (2009).[6]

Left unaddressed, the inconsistency in disestablishment analysis may also impede further cooperative efforts between federal, tribal and state law enforcement agencies. *See Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (noting the "host of cooperative

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[5] Available at http://www.usdoj.gov/otj/pdf/american_indians_and_crime.pdf.

[6] Available at http://indian.senate.gov/upload/Report-111-93.pdf. In a written response to a request by the Senate on Committee Indian Affairs, the Department of Justice reported that Indian country declination rates were 52.2% for Fiscal Year 2007 and 47% for 2008. In comparison, reported declination rates for non-Indian country federal prosecutions were 20.7% for Fiscal Year 2007 and 15.6% for 2008.

agreements between tribes and state authorities . . . to provide law enforcement") (O'Connor, J., concurring). *Amicus curiae* strongly urge this Court to adopt a clear framework on disestablishment analysis in order to reduce jurisdictional confusion and aid cooperation by all sovereign parties engaged in the administration of criminal justice in Indian country.

b. Inconsistency in Disestablishment Analysis Produces Confusion As To Civil Jurisdiction Amongst Sovereign States Which Stymies the Social and Economic Development of Indian Country.

The status of a reservation not only impacts the internal governance of a tribe, but also its external relationships with a state and the federal government. Incongruent application of disestablishment review impairs the operation of these sovereign relationships and prevents tribes from exercising congressionally recognized rights of self-determination and governance. As with criminal jurisdiction, an inquiry into the status of lands as "Indian country" strikes at the core of any determination of civil regulatory authority. "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 428 n. 2 (1975) (citations omitted).

A simple list of cases on disestablishment and diminishment decided by this Court provide a good illustration of the multifarious effects these doctrines have on either stabilizing or undermining tribal self-determination: hunting and fishing rights, *Mattz v. Arnett*, 412 U.S. 481 (1973); environmental regulation, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); and child welfare and social services, *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Indeed, in *DeCoteau*, Justices Douglas, Brennan, and Marshall in their dissent acknowledged that the case arising out of two consolidated petitions, one of which involved the removal of Indian children, concerned "a problem of domestic relations which goes to the heart of tribal self-government." 420 U.S. at 465 n. 8.

It is of national importance that the Court reduce jurisdictional confusion by providing tribes, states and the federal government with a consistent framework to facilitate the determination of reservation boundaries. As the overview of cases and legislative policies above show, the question of disestablishment affects nearly every aspect of tribal self-governance, thus hindering the ability of tribes to engage in the economic and social development of their communities. Moreover, the jurisdictional uncertainty cast by the question of disestablishment has the ability to place tribes in "sovereign suspension", by preventing them from accessing their congressionally recognized rights of self-determination without

engaging in a costly litigation of their boundaries. Case law already indicates this precarious trend.

In *Michigan v. E.P.A.*, 268 F.3d 1075 (D.C. Cir. 2001), the D.C. Circuit considered whether the Environmental Protection Agency ("EPA"), under its program of treating Indian tribes as "states" for purpose of administering air quality standards developed pursuant to Clean Air Act ("CAA"), 42 U.S.C. § 7601(d) (2006), had authority to administer the program on tribal lands whose status was "in question." The court not only held that a tribe did not have jurisdiction over such lands in question, but that a finding of tribal jurisdiction over land was required through notice and comment rulemaking, rather than on a case-by-case analysis, before even the federal government could assume regulatory jurisdiction. *Id.* at 1089. This essentially means that whenever a party "questions" the status of a reservation, Indian tribes without litigated reservation boundaries cannot operate many environmental programs.

In the petition, Osage Nation effectively demonstrates the conundrum faced by federal agencies across the board when executing their statutory duties on behalf of tribes. Pet. at 23-26. Whether it is the U.S. Department of Justice investigating and prosecuting a murder on the Osage Reservation; the Department of the Interior seeking to defend the tribe's water rights appurtenant to the reservation or enforcing federal liquor laws; or the National Indian Gaming Commission approving a state-tribal gaming compact or enforcing federal gaming laws, each

circumstance illustrates the inability of federal agencies to take any action if reservation boundaries are so easily called into question by reference to subsequent events or modern demographic statistics.

It is of national importance that this Court address this jurisdictional confusion and facilitate Congress' policy of self-determination by providing tribes, states and the federal government with a consistent framework of analysis to determine whether a reservation's boundaries have been diminished or disestablished.

2. This Case Provides An Excellent Vehicle Upon Which to Clarify the Law Governing Diminishment or Disestablishment of Reservation Boundaries.

This case provides a unique opportunity for this Court to affirm the preeminence of statutory language in discerning congressional intent through an allotment act which poignantly lacks any markers indicating diminishment. *See* Pet. at 13-18 (providing an in-depth review of the statutory text). As the court of appeals itself noted, the "operative language of that statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010). In addition, the Osage Act satisfies three additional factors that weigh in favor of continued reservation status: part of the land was authorized by the Secretary of the Interior to be set aside for tribal purpose; permission by tribal members to

obtain individual allotments before the land was opened; and mineral resources to the tribe were reserved as a whole and never allotted. *Id.* at 1123. Thus, given the Tenth Circuit's admission, their disregard of the probative value of statutory evidence provides this Court with a record that directly and distinctly embodies the disagreement amongst the circuits.

This case also provides a better vehicle for review of the proper standard for holding a reservation disestablished because it lacks the procedural complexity of other cases. This Court recently granted the writ of certiorari in *Madison County v. Oneida Indian Nation*, (No. 10-72), 79 USLW 3062 (U.S. Oct. 12, 2010), first on the question of whether tribal sovereign immunity can be used as a defense in foreclosure proceedings for non-payment of property taxes, and only secondarily on the question of reservation disestablishment. This case singularly presents and focuses the important question of disestablishment, and does so after full consideration and analysis by the court of appeals, unlike in *Madison County*.

The procedural complexity of *Madison County* arises out of the 2001 federal district court decision and the 2003 federal court of appeals decision which both held that the Oneida Indian Reservation was not disestablished. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F.Supp. 2d 226 (N.D.N.Y. 2001); and *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). After granting review, this Court refrained from evaluating the question of disestablishment, thus leaving the

reservation's boundaries intact, but holding that the Oneida Nation was subject to the property taxes based on the equitable principles of laches, impossibility and acquiescence. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 216 n. 9 (2005).

By contrast, this case serves as a better vehicle for the Court to address the inter-circuit conflict since it presents just one overarching legal question: the provision of a uniform framework for disestablishment analysis.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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